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TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1942

No. 698

DANIEL F. BOONE, PETITIONER,

vs.

CLARENCE M. LIGHTNER, THEODORE A. LIGHTNER, MRS. ALICE LIGHTNER HOPF, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED FEBRUARY 2, 1943.

CERTIORARI GRANTED MARCH 8, 1943.

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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[fol. 1]

SUPREME COURT OF NORTH CAROLINA, EIGHTEENTH DISTRICT, FALL TERM, 1942

No. 164

From Henderson

CLARENCE M. LIGHTNER, THEODORE A. LIGHTNER, MRS. ALICE LIGHTNER HOPF, Mrs. Martha Lightner Boone and Martha Penelope Boone, A Minor, Represented in This Proceeding by Her Next Friend, W. C. Hague, Plaintiffs,

v.

DANIEL F. BOONE, Trustee for Martha Penelope Boone, A Minor

Before Sink, J., May-June 1942 Term of Henderson Superior Court—Defendant Appealed

STIPULATION

It is stipulated by and between the plaintiffs and the defendant that Clarence M. Lightner, Theodore A. Lightner, Mrs. Alice Lightner Hopf, Mrs. Martha Lightner Boone and Martha Penelope Boone, a minor, represented in this proceeding by her next friend, W. C. Hague, are the plaintiffs, and that Daniel F. Boone, Trustee, is the defendant in said action, and that the said parties mentioned are the only parties in said action; that the said Martha Penelope Boone, Minor, is represented in the proceeding by her next friend, W. C. Hague, who was duly appointed next friend; that the said action was duly instituted in the Superior Court of Polk County by summons duly issued by the Clerk of the [fol. 2] Superior Court of Polk County and said summons was duly served on the defendant, Daniel F. Boone, Trustee, on the 23rd day of June 1941; that it shall be unnecessary to include the summons as a part of the record; that the action was heard before His Honor, H. Hoyle Sink, Judge presiding at the regular May-June 1942 Term for the trial of civil cases in Henderson County, and that the Court was properly organized.

It is further stipulated and agreed that the record of the case on appeal to the Supreme Court shall consist of this

stipulation, the complaint and exhibits thereto, the answer, the reply, the order made at the January-February Term 1942, of the Superior Court of Polk County transferring the case to Henderson County for trial; the order made at the May-June Term 1942 of the Superior Court of Henderson County denying the motion of the defendant for a continuance; the verdict of the jury, the judgment and the entries of appeal; the case on appeal as settled by the trial Judge; defendant's assignments of error, and the Clerk's certificate.

It is further agreed that the order transferring the case from the Superior Court of Polk County to the Superior Court of Henderson County for trial, and the order denying defendant's motion for a continuance, both of which are made a part of the case on appeal, are correctly transcribed in said case on appeal and need not be set out as a part of the record proper.

It is further agreed that it shall not be necessary to print the captions and verifications of the pleadings.

This 1st day of August, A. D. 1942.

M. R. McCown, J. E. Shipman, Attorneys for Plaintiffs. Williams & Cocke, Attorneys for Defendant.

[fol. 3] IN SUPERIOR COURT OF POLK COUNTY

COMPLAINT

The above named plaintiffs, complaining of the above named defendant, allege:

1. That the plaintiff, Clarence M. Lightner, is a resident of the State of New Mexico; the plaintiff, Theodore A. Lightner and Mrs. Alice L. Hopf, are residents of the State of New York, the plaintiff, Mrs. Martha Lightner Boone, is a resident of the County of Polk and State of North Carolina, and that the plaintiff, Martha Penelope Boone, who is a minor, less than three years of age, is a resident of Forsyth County, and State of North Carolina, and is represented in this action by her next friend, W. C. Hague, who is a resident of Polk County, North Carolina.

2. That the defendant, Daniel F. Boone, is a resident of the County of Forsyth, and State of North Carolina, but is now temporarily absent therefrom, is in the military service

of the United States, and spends the larger part of his time in Washington, D. C.

3. That the above named plaintiffs, other than Martha Penelope Boone, are children of C. A. Lightner and Frances M. Lightner, deceased, each of whom, at the time of their death, were residents of the County of Polk and State of North Carolina. That both of their said parents died testate, and their respective wills are each probated and of record in the said County of Polk and State of North Carolina. That the plaintiff, Martha Penelope Boone, is a grand-daughter of the said parents of the other plaintiffs, and is a daughter of the marriage of the plaintiff, Martha Lightner Boone, and of the defendant, Daniel F. Boone.

4. That Frances M. Lightner, the mother of the said adult plaintiffs, by her last will and testament, created a trust fund for the education of all of her grand-children born prior to her death, in the sum of $40,000.00, the terms [fol. 4] and provisions of said trust being fully set forth therein, and which are herein specifically referred to and asked to be taken as a part hereof, a copy of said will being hereto annexed, and marked Exhibit A.

5. That the said Frances M. Lightner left surviving her the following grand-children, viz: Theodore Lightner, III, son of the plaintiff, Theodore A. Lightner; Claudia Lightner, daughter of the plaintiff, Clarence M. Lightner; and Daniel L. Boone, son of the plaintiff, Martha Lightner Boone, and of the defendant, Daniel F. Boone.

6. That the said Frances M. Lightner named the defendant, Daniel F. Boone as Trustee in said will, and also as Executor therein. That said defendant duly accepted said trusteeship, and duly qualified as executor, and in the course of the administration of said estate, brought a suit in the Superior Court of Polk County for the purpose of having said will construed, which was heard at the January Term 1940, of the Superior Court of Polk County, and judgment was therein rendered construing said will, and which said judgment is herein referred to and is asked to be taken as a part hereof, a copy of same being hereto annexed and marked Exhibit B.

7. That subsequent to the death of the said Frances M. Lightner and prior to the death of the said Clarence A.

Lightner, the plaintiff, Martha Penelope Boone, as hereinbefore alleged, was born of the marriage of the said Martha Lightner Boone, and the said Daniel F. Boone.

8. That the said Clarence A. Lightner, knowing that the other three grand-children above named had been provided for in the will of the said Frances M. Lightner, as hereinbefore alleged, and feeling that the said Martha Penelope Boone should have like provision made for her education as has been made for the other three children by the said [fol. 5] Frances M. Lightner, assigned and transferred two of his life insurance policies aggregating $15,300.00 to the plaintiff, Martha Lightner Boone, with the distinct understanding and agreement between him, the plaintiff Martha Lightner Boone, and the defendant Daniel F. Boone, that the proceeds of said insurance, when collected, should constitute a trust fund for the education of the said Martha Penelope Boone, on the same terms and provisions as set forth in the will of the said Frances M. Lightner for the management and control of the trust fund provided for the other three grand-children.

9. That after the death of the said Clarence A. Lightner, the said life insurance policies above referred to, were paid to the plaintiff, Martha Lightner Boone, by checks issued by the companies that issued said policies, and upon the receipt of said checks, and at the request of the defendant, Daniel F. Boone, the said Martha Lightner Boone, endorsed and delivered said checks to said defendant, who cashed the same, and received said funds as trustee for the said Martha Penelope Boone under the terms and provisions set forth in the will of the said Frances M. Lightner; that is to say, the terms and provisions set forth in the will of the said Frances M. Lightner were to control and govern the investment and management of the said fund to the same extent and in the same manner as if the said Martha Penelope Boone had been born prior to the death of the said Frances M. Lightner.

10. That under the term of said agreement the funds belonging to said trust were to be held by the said defendant, Daniel F. Boone, as Trustee, in the same manner as are the funds held by him as Trustee for the three grandchildren coming within the trust created by the said Frances M. Lightner in her said last will and testament, and the

Advisory Committee therein created, to-wit: Dr. Arthur McGraw, and the plaintiff, Theodore A. Lightner, were and are to have the same authority with respect to the control [fol. 6] and management of said fund as was conferred upon them by the will of the said Frances M. Lightner, as construed by the judgment of the court above referred to.

11. That said Advisory Committee has not been consulted by the said Daniel F. Boone in any way whatsoever with respect to the trust fund created for the benefit of the said Martha Penelope Boone by the agreement herein alleged, and neither member of said Committee has any information or knowledge as to how said fund has been invested, managed and controlled by the said Daniel F. Boone, all of which conduct on the part of the said Daniel F. Boone is in direct violation of the terms of said agreement.

12. That the said defendant, Daniel F. Boone, has not only failed and neglected to consult the two members of said Advisory Committee hereinbefore mentioned with respect to the investment and management of said fund, but has never made any report to the Clerk of the Superior Court of Polk County with respect thereto as he is in law required to do, and has refused to disclose to the plaintiffs the character and nature of the securities in which said fund is invested, and the amount of interest or dividends he has received therefrom.

13. That as the plaintiffs are advised, informed and believe, said defendant is not only failing and refusing to invest and manage said fund as required by the will of the said Frances M. Lightner, but, as the plaintiffs are advised, informed and believe, said defendant is not handling and investing said funds in a safe and proper manner as his duty as trustee would require, even if he was not required to handle them as provided by the will of the said Frances M. Lightner.

14. That because of the failure and refusal of the defendant to invest and manage said fund, as provided in the will of the said Frances M. Lightner, and because of his failure [fol. 7] and refusal to disclose to these plaintiffs the nature and character of his investment of said fund, the plaintiffs are apprehensive that said fund is not only not being invested in safe interest-bearing or dividend producing secu-

rities, but that the same is being dissipated by said defendant.

15. That the adult plaintiffs herein under the will of the said Frances M. Lightner, and under the agreement hereinbefore alleged, have a contingent interest in said fund in that they become the owners thereof in the event the plaintiff, Martha Penelope Boone, should die prior to the full distribution of said fund for the purpose for which it was created, and because of such interest, are proper and necessary parties to this action.

16. That because of the minority of the plaintiff, Martha Penelope Boone, it is the duty of the court to see that said fund is properly held, managed and invested for the benefit of said plaintiff, and to require proper accountings by the said defendant with respect thereto.

Wherefore, the plaintiff asks:

1. That judgment be entered declaring the defendant trustee of said funds under the terms and provisions set forth in the will of the said Frances M. Lightner for the management, investment and control of the trust fund therein created for the other grand-children of said testator, and that the Advisory Committee therein created be adjudged to have the same authority and control over said fund as it has over the trust fund created by said will as declared by the judgment hereinbefore referred to and of which Exhibit B hereof is a copy.

2. That said defendant be required to disclose the nature and character of the securities in which said trust fund is invested, and the amount of interest or dividends that are [fol. 8] being received therefrom, and the disposition that is being made of same.

3. That said defendant be required to show to the court that said fund has been kept intact and that it is invested in safe, interest bearing or dividend producing securities, and that he required to report to the court at regular intervals the status of said fund, and the manner in which the trust herein alleged is being executed.

4. That in the event of the failure of said defendant to fully account for all of said funds, or to show that said funds are invested in safe, solvent securities, that he be removed

as Trustee, and that some other competent, suitable and responsible person be appointed in his stead.

5. For the costs of this action and such other and further relief as to the Court may seem just and equitable.

Massenburg, McCowan & Arledge, J. E. Shipman,
Attorneys for Plaintiffs.

(Verified)

Exhibit "A" to Complaint

LAST WILL AND TESTAMENT OF FRANCES M. LIGHTNER

I, Frances M. Lightner, of Tryon, Polk County, North Carolina, being of sound mind and disposing memory, but considering the uncertainty of my earthly existence, declare and publish the following as my last will and testament, hereby revoking and declaring utterly void all former Wills, Testaments and Codicils by me heretofore at any time made.

First: I direct my Executor, or his successors, hereinafter named, to pay all my just debts, including funeral expenses, suitable monument, and I specifically direct that all taxes, succession, inheritance, estate, transfer, gift or whatsoever called or named, to be paid out of the funds of my estate, whether levied against my estate or any beneficiary [fol. 9] or beneficiaries named in this my last will. It is my express purpose that no taxes be charged against any of the inheritance they receive or to be received.

Second: I give, bequeath, devise and transfer to my Executor and/or my Trustee hereinafter named, all of my personal property, wheresoever situate, of which I may die seized, or possessed, or to which I may be entitled at the time of my death, or afterwards, to my Executor and/or Trustee hereinafter named, for the following uses and purposes to hold as Trustee, in the manner following:

I give, bequeath, devise and transfer to my Trustee, hereinafter named, all my real estate, wheresoever situate, of which I may die seized, or possessed, or to which I may be entitled at the time of my death, or afterwards, to my Trustee, hereinafter named, outright, in fee, for the following uses and purposes, to hold as Trustee, to dispose of and handle as directed in this my last will and testament.

(1) I direct my Trustee to pay to my husband, Clarence A. Lightner, or to any person, firm or corporation for him, in event of his incapacity, the entire net income from the trust property and estate at monthly intervals during his lifetime. Any accrued income at date of his death shall revert to the principal of my estate and shall not be considered due to the estate of my husband.

(2) Upon the death of my husband, Clarence A. Lightner, I direct that my Trustee pay his just debts, funeral expenses, suitable monument, taxes, and then to pay over, transfer, assign deed and deliver all the rest, residue and remainder of my trust property and estate to my children as follows:

Theodore Alexander Lightner, son, one-fourth;
Clarence McGraw Lightner, son, one-fourth;
Alice Lightner Hopf, daughter, one-fourth;
Martha Lightner Boone, daughter, one-fourth, except [fol. 10] that Theodore Alexander Lightner, my son, because of monies previously borrowed from his inheritance, shall pay from his inheritance, the sum of fifteen thousand dollars ($15,000.00) to be divided equally between my three other children.

Should any of my children wish to purchase the homestead, including all personal property used in, around or about the homestead, furniture, fixtures, outbuildings, etc., known as "Seven Mountains" at Tryon, North Carolina, it is my wish and I direct my Trustee to arrange a conveyance of same to the child offering the highest amount for same, on reasonable terms. Said price and terms to be for the best interest of the estate.

I hereby bequeath to my beloved son-in-law, Daniel F. Boone, the sum of Five Thousand Dollars ($5,000.00) in consideration of his devotion and attention to Mr. Lightner, myself, and for the management of our properties, both for Mr. Lightner, myself and our children, and for recovery of various stock and securities for our estate, said services being rendered during our lifetime. This legacy is only a small part of the amount actually recovered for our benefit.

(a) In the event any of my said children shall have died prior to the death of my husband, Clarence A. Lightner, leaving a spouse or bodily issue, then it is my intention and I direct my Trustee, or his successor, to hold in trust, upon

the terms and conditions as herein provided, the share such deceased child would have taken, and if the spouse of such deceased child be living and such deceased child leave issue, pay over, during the life of such trust, to such spouse one-fourth (¼th) of the income from the share of such deceased child and as long as such spouse not remarry, and pay three-fourth's (¾ths) of the income from the share of my deceased child to the issue of my deceased child in equal proportions, and until such time as said trust is terminated as hereinafter provided.

[fol. 11] (b) In the event no spouse survives my deceased child, or in the event of the death or remarriage of such spouse during the term of the trust as herein provided and if any issue of my deceased child shall be living after the death or remarriage of such spouse, then all income from such share, so held in trust, and until the termination of said trust, shall be paid to the issue of such deceased child in equal proportions.

(c) It is my intention and I further direct my Trustee, upon the youngest of such issue of my deceased child reaching the age of twenty-one (21) years, then the trust herein established for the share of such deceased child of mine shall terminate and my Trustee, or his Successor, shall pay over, transfer, assign and convey to the living issue of such deceased child of mine, share and share alike, all the corpus and residue of such trust estate; and in the event any of said issue of my deceased child shall have died prior to reaching the age of twenty-one (21) years, leaving issue, then such issue to receive in equal proportions the deceased parent's share. In the event all issue of my deceased child die prior to reaching the age of twenty-one (21) years, and without leaving issue, and upon the death or remarriage of the spouse of such deceased child, I direct my Trustee to transfer, assign and convey the corpus of such trust estate to my children, share and share alike, the issue then living of a deceased child of mine to take the parent's share by right of representation.

(d) In the event any of said children shall have died prior to the death of my husband, Clarence A. Lightner, leaving a spouse but without leaving bodily issue, or, in the event all issue of my deceased child die without leaving issue, prior to all reaching the age of twenty-one years, then it

is my intention and I direct my Trustee, or his successor, to assign, transfer and convey to such spouse of my de- [fol. 12] ceased child one-fifth (1/5th) of the corpus of the estate which such deceased child of mine would have taken, and I direct my Trustee, or his successor, to hold in trust, upon the same terms and conditions, as herein provided, four-fifths (4/5ths) of the said share that such deceased child of mine would have taken, and pay over to said spouse the income from such trust so long as such spouse lives and does not remarry; and upon the death or remarriage of such spouse, the remainder of the corpus of the estate of such deceased child of mine shall be thereupon distributed to my children, share and share alike, the issue then living of a deceased child of mine to take the parent's share by right of representation.

(3) In the event any child of mine shall have died prior to the termination of the trust for my husband, Clarence A. Lightner, without leaving bodily issue and without leaving a spouse, then such living children of mine shall take all the share that such deceased child of mine would have taken, share and share alike, the issue then living of a deceased child of mine to take the parent's share by right of representation.

(4) If, in the opinion of the Trustee, the income herein provided shall not be sufficient to suitably support and maintain my husband, Clarence A. Lightner, or in the case of any emergency such as illness, accident or extraordinary distress, then the Trustee shall, if he deems it advisable so to do, use and spend such part of the principal of the trust estate as may be necessary to make up such deficiency or meet such emergency.

(5) No stock dividends, or rights to subscribe for stock, whether availed of or sold by the Trustee, shall be considered as income, but the same shall be considered as an increment in value of principal and added to the principal of the Trust Estate, after deducting therefrom, as a charge against the same, all income taxes payable with respect [fol. 13] thereto. All cash dividends excepting liquidating dividends shall be considered as income.

After the termination of Paragraph I, and before Paragraph II become operative, I direct my Executor and/or Trustee to pay over, set aside, transfer to a separate trust

fund, the sum of $40,000.00, either in cash, stocks, bonds or other securities, such property in kind, other than cash, to have a value of at least $40,000.00, to be held separate and apart from any other provision of this my last will and testament, by my Trustee for the following uses:

(a) This fund is to be held intact both to principal and income by my Trustee for all of my grand-children alive at the date of my death. After-born grand-children are specifically not included in this trust. My Trustee is to use the income and/or the principal if needed for the proper college education of my grand-children who desire to attend a Grade-A American institution for a 4-year period of college attendance immediately after they finish their course in High School, Junior College or its equivalent. It is my desire that each of my grand-children have an undivided pro rata interest in this entire fund, such interest to be determined by the number of grand-children living at the date of my death. My Trustee is directed to pay the tuition, board, room rent and necessary books for each year's attendance in college for each grand-child for a 4-year period. Said grand-child shall not expend more than their pro rata part of such funds for each school year. I direct my Trustee to set up their pro rata interest and then divide such interest into four equal payments, and expend the one-fourth (¼) share each school year, if necessary, but not to exceed the one-fourth (¼th) share. If any grand-child should not use his pro rata share for the school year, then it is my intention for my Trustee to pay over to such grand-child not using his pro rata part to him or her directly, after completion of each successful year. My Trustee, [fol. 14] Daniel F. Boone, together with his advisory committee, Dr. Arthur B. McGraw and Theodore A. Lightner, is to have sole discretion in the manner of deciding and pro-rating such part. In case of difference of opinion in settling any matter in this trust, it is my desire that two of the three above named as Executor, Trustee or Advisory Committee be the deciding factor. It is my further wish that this trust be terminated as to each grand-child as and when reaching the age of thirty (30) years.

(b) I further direct that if my grand-children mentioned above do not attend college and graduate successfully from a credited Grade-A American institution, my Trustee shall

transfer such grand-child's pro rata to the other grand-children completing such course. If none of my grand-children finish their credited 4-year course in college, and are thereby not entitled to the balance remaining in said fund, then the balance of said fund shall go to my children equally, and in case of the death of any of my children, to their issue then surviving.

Third: Should my husband, Clarence A. Lightner, predecease me, I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal and mixed, and wheresoever situate, of which I may die seized, or possessed, or to which I may be entitled, to my children, as follows:

Theodore Alexander Lightner;
Clarence McGraw Lightner;
Alice Lightner Hopf; and
Martha Lightner Boone; if then living, and in the following proportions:

One-fourth (¼th) to my son, Theodore Alexander Lightner;
One-fourth (¼th) to my son, Clarence McGraw Lightner;
One-fourth (¼th) to my daughter, Alice Lightner Hopf; and
One-fourth (¼th) to my daughter, Martha Lightner [fol. 15] Boone, except that Theodore Alexander Lightner, my son, because of monies previously borrowed from his inheritance, shall pay from his inheritance, the sum of Fifteen Thousand ($15,000.00) Dollars, to be divided equally between my three other children.

(1) Should any of my children predecease me, leaving a spouse or bodily issue, and should my husband, Clarence A. Lightner, also predecease me, whereby the trust as established in paragraph second on my will shall not become effective, then, I give, devise and bequeath all of that share of my estate and which such deceased child of mine would have taken, unto Daniel F. Boone, of Winston-Salem, North Carolina, to hold as Trustee, in the manner following:

(a) To hold in Trust upon the same terms and conditions as herein provided, the share of such deceased child would have taken and if the spouse of such deceased child be living and such deceased child leave issue, I direct my Trus-

tee, during the life of such trust, to pay over to such spouse one-fourth (¼th) of the income from the share of such deceased child so held in trust and so long as such spouse does not remarry and three-fourths (¾ths) of the income from the share of such deceased child to be paid to the issue of such deceased child in equal proportions, and until such time as said trust is terminated as hereinafter provided.

(b) In the event no spouse survives my deceased child, or in the event of the death or remarriage of such spouse during the term of the trust, as herein provided, and if any issue of my deceased child shall be living after the death or remarriage of such spouse, then all income from such share, so held in trust, and until the termination of said trust, shall be paid to the issue of such deceased child in equal proportions.

(c) It is my intention and I further direct my Trustee, [fol. 16] upon the youngest of such issue of my deceased child reaching the age of twenty-one (21) years, then the trust herein established for the share of such deceased child of mine shall terminate and my Trustee, or his successor, shall pay over, transfer, assign and convey to the living issue of such deceased child of mine, share and share alike, all the corpus and residue of such trust estate; and in the event any of said issue of my deceased child shall have died prior to reaching the age of twenty-one (21) years, leaving issue, then such issue to receive in equal proportions the deceased parent's share. In the event all issue of my deceased child die prior to reaching the age of twenty-one (21) years, and without leaving issue, and upon the death, or remarriage of the spouse of such deceased child, I direct my Trustee to transfer, assign and convey, the corpus of such trust estate to my children, share and share alike, the issue then living of a deceased child of mine to take the parent's share by right of representation.

(d) In the event any of my children predeceases me without leaving bodily issue, but leaving spouse, or in the event all issue of deceased child die, without leaving issue, prior to reaching the age of twenty-one (21) years, then it is my intention and I direct my Trustee, or his successor, to assign, transfer and convey to such spouse of my deceased child, one-fifth (1/5th) of the corpus of the estate which such deceased child of mine would have taken, and I direct my Trus-

tee, or his successor, to hold in trust, upon the same terms, and conditions as herein provided, four-fifths (4/5ths) of said share that such deceased child of mine would have taken, and pay over to said spouse the income from such trust so long as such spouse lives and does not remarry and upon the death or remarriage of such spouse, the remainder of the corpus of the estate of such deceased child of mine shall be thereupon distributed to my children, share and share alike, the issue then living of a deceased child of [fol. 17] mine, to take ~~the~~ parent's share by right of representation.

(e) In the event my husband, Clarence A. Lightner, predeceases me, and in the event any of my children predecease me, without leaving bodily issue and without leaving a spouse, then such living children of mine shall take all the share that such deceased child of mine would have taken, share and share alike, the issue then living of a deceased child of mine, to take the parent's share by right of representation.

(2) No stock dividends, or rights to subscribe for stock, whether availed of or sold by the Trustee, shall be considered as income, but the same shall be considered as an increment in value of principal and added to the principal of the Trust Estate, after deducting therefrom, as a charge against the same, all income taxes payable with respect thereto. All cash dividends excepting liquidating dividends shall be considered as income.

Fourth: I give, devise and bequeath to the Trustee, hereunder, and including all the trust that may become operative hereunder, the following powers and authority in respect to such mentioned trust estate:

(1) To take possession of said trust property and estate and collect and receive the moneys, interest, profits, and income arising therefrom, with full power in the Trustee to improve, repair and maintain any and all property belonging to said Trust Estate, and to manage the same and all said Trust Estate, as in the judgment and discretion of my Trustee may seem most advantageous to said Trust Estate, and the beneficiary thereof. Included in such power of management shall be the power to vote, in person, or by proxy, any and all stocks in any and all corporations, at

any and all meetings of stockholders, for any and all purposes, without any limitation whatsoever.

[fol. 18] (2) To retain in said Trust all properties in the form in which the same shall be received by the Trustee and to sell, either for cash or part cash and part deferred payments, convey, exchange, lease for any length of time, and with or without covenants of renewal, mortgage, pledge, partition, distribute or otherwise dispose of all of said trust property and estate, or any part thereof, or any interest therein, at such time or times and in such manner, either public or private, and upon such terms as in the absolute and uncontrolled discretion of said Trustee may seem expedient and proper, without Order of Court.

(3) In the event of any disposition whatever of any property subject to said Trust, said Trustee shall make, execute and deliver any and all such instruments in writing as shall be necessary or proper to carry out the same. Purchasers and other persons who shall pay any trust moneys to my said Trustee shall be exempt from all responsibility with respect to the application of the same, and from the necessity of inquiring into the regularity, validity or propriety of any disposition made, or purported to be made under the Trust or powers contained in this Will.

(4) To invest the funds of said Trust Estate, including the proceeds of the disposition of any of the property thereof and re-invest the same from time to time, and to keep the same re-invested in such income producing real or personal property, without being limited at any time to investments required for Trust Funds by the Laws or Statutes of the State of North Carolina, or any other jurisdiction.

(5) To distribute in kind, at a price to be fixed by the Trustee, any stocks, bonds or other securities, at any time belonging to my estate, in equal or unequal proportion to or among the persons entitled to participate in any distribution thereof. The selection of the securities for the distributions, the proportions and the prices thereof shall rest in [fol. 19] the sole judgment and discretion of the Trustee, and when selected the proportions determined and the prices fixed by the Trustee, the same shall be final, conclusive and binding upon all parties concerned therewith.

(6) To pay from time to time from the income of the Trust Estate all necessary and proper expenses incurred in connection with the management, care and preservation of said Trust Property and Estate, and upon all such expenses and charges being paid, the net income shall be paid out, used and expended as hereinbefore directed.

Fifth: I hereby constitute, appoint, name and specifically make my son-in-law, Daniel F. Boone, of Winston-Salem, North Carolina, my lawful Executor, to serve without bond, and to have the powers heretofore enumerated and to the extent of law, given by Statute. I appoint Dr. Arthur B. McGraw, Jr., of Detroit, Michigan, and Theodore Alexander Lightner, of New York, N. Y., as an Advisory Committee, to assist and advise my Executor and Trustee, Daniel F. Boone, in the administration of this, my last Will and Testament. Should Daniel F. Boone fail to serve as Executor, Dr. Arthur B. McGraw, Jr., qualifies and finishes the administration of this will, I appoint Theodore Alexander Lightner, my Executor and Trustee, any of which has the powers given by Executor and Trustee.

I hereby constitute, appoint, name and specifically make my son-in-law, Daniel F. Boone, of Winston-Salem, North Carolina, my trustee, to serve without bond, and to have the powers hereinbefore enumerated and to the extent of law given by Statute. In the event of the failure of Daniel F. Boone to act as Trustee, his successors are to act as set forth as Executors. Is his compensation for serving as Executor and/or Trustee, Daniel F. Boone, is to retain as his commission the following:

[fol. 20] 5% on the first $50,000.00 Receipts.
3% on the next $450,000.00 Receipts.
1½% on all over $500,000.00 Receipts.

No compensation is to be paid to the Advisory Committee, however, the Successor, Executor and/or Trustee, if any, shall be paid the same commission as allowed Daniel F. Boone.

In Witness Whereof, I have set my hand and seal, this the 23rd day of May, 1938, at Tryon, North Carolina.

(s) Frances M. Lightner (Seal).

Signed, sealed, published and declared by the said Frances M. Lightner, and for her last Will, in the presence

of us, who, at her request, and in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

Sarah Elliott, Columbus, N. C.; Norman J. Collins, Tryon, N. C.

EXHIBIT "B" TO COMPLAINT

STATE OF NORTH CAROLINA, POLK COUNTY

IN THE SUPERIOR COURT, JANUARY-FEBRUARY TERM, 1940

DANIEL F. BOONE, Extr.,

v.

THEODORE A. LIGHTNER, et al.,

Judgment

This cause coming on to be heard before His Honor, Frank M. Armstrong, Judge presiding at the January-February, 1940 Term, Superior Court of Polk County, upon the petition of Daniel F. Boone, Executor and/or Trustee of the Will of Frances M. Lightner, deceased, and

It appearing to the Court that all of the devisees and legatees, and the Advisory Committee named in said Will are parties defendant, and that the infant defendants, Theodore A. Lightner, Jr., Daniel Lightner Boone, and Claudia Lightner, are represented herein by their duly appointed [fol. 21] Guardian ad litem, Walter Johnston, Jr., who has filed an answer for them, and that all of the parties defendant, as well also as the petitioner, are asking the Court to construe the Will of said testatrix, and to advise and direct the Executor and/or Trustee as well also as the Advisory Committee as to their duties with respect to the Trust Fund provided for in said Will, and the administration of said estate;

And the Court being of the opinion that under said Will, it is the sole duty of Daniel F. Boone, as Executor and/or Trustee to set up the Educational Trust Fund provided for therein for the minor defendants hereinbefore named, and to determine the personal assets that shall constitute said Trust Fund, and

It further appearing that after the death of Clarence A. Lightner, who died December 8, 1938, to-wit: On August 24, 1939, the said Daniel F. Boone, as Executor and/or Trustee set up the Trust Fund provided for said minor defendants consisting of the following securities, namely:

Insurance Co. of North America, 53 shares at $64.50 per share	$ 3,418.50
McGraw Electric Company, 380 shares at $19.75 per share	7,505.00
Chrysler Corporation, 100 shares at $74.12½ per share	7,412.50
E. I. duPont de Nemours Co., 50 shares at $157.62½ per share	7,771.25
S. S. Kresge Company, 125 shares at $23.75 per share	2,968.75
Nelson, Baker & Company, 2,759 shares at $3.00 per share	8,277.00
Youngstown Sheet & Tube Company, 70 shares at $36.00 per share	2,520.00
[fol. 22] Cash	17.00
	$40,000.00

It is therefore Ordered and Adjudged that the said Trust Fund as set up and established by said Executor and/or Trustee be, and the same is hereby in all respects approved and confirmed and that said securities hereinbefore listed shall constitute said Trust Fund.

The Court being further of the opinion that the Advisory Committee, namely: Dr. Arthur B. McGraw, Theodore A. Lightner, and the Trustee, Daniel F. Boone, each have an equal duty in the administration of said Trust where some difference of opinion arises in settling any matter in this trust.

It is further ordered that it is the duty of said Advisory Committee and said Trustee to administer said trust fund in accordance with the provisions of said Will, and that it is the duty of the Trustee, if any change is made in the trust hereinbefore set up or referred to in this judgment, that he confer with said Advisory Committee; and in the event there is some difference of opinion as to a change in said trust fund herein set up, that the decision of a majority of said number shall be controlling and binding.

The Court further being of the opinion that the provisions made for the compensation of the Executor and/or Trustee in said Will is determinative of the amount to which he is entitled in full for all services rendered by him in connection with the administration of said estate both as Executor and/or Trustee and that under said Will the said Executor and/or Trustee is not entitled to any attorneys' fees for himself, personally.

The Court being of the opinion that under the provision of the Will that the Executor and Trustee as compensation [fol. 23] for acting as Executor and Trustee, is entitled to 5% on all receipts up to the first $50,000.00, and 3% on all receipts up to the next $450,000.00.

The Court in construing the Will has done so without prejudice to any rights of attorneys' fee which Daniel F. Boone may be entitled as a result of any contract he may have with the beneficiaries of the estate of the late Frances M. Lightner, and the said Daniel F. Boone.

It is further ordered that a full and complete audit be made of all the books and records of said Executor and/or Trustee and that all the assets that belong to said estate be ments and expenditures made by said Executor and Trustee ascertained and reported therein as well as the disburseso that audit will reflect fully in detail the true and correct status of said estate, as far as same can be ascertained by said auditor.

It is further ordered that H. C. Northrop, Certified Public Accountant, Independence Building, Charlotte, North Carolina, be hereby appointed to make said audit and when same is completed one copy thereof is to be filed with the Clerk of this Court, one delievered to the Executor and Trustee, and one delivered to M. R. McCown, attorney for the adult beneficiaries herein.

The Court is of the opinion that Two Hundred and Fifty Dollars ($250.00) is a reasonable and fair fee to pay said Walter Johnston for said services and the Executor of the Estate of the late Frances M. Lightner is ordered and directed to issue a check to him in the sum of Two Hundred and Fifty Dollars.

It also being made to appear to the Court that the adult devisees and legatees under said Will, other than Theodore A. Lightner, have been paid One Thousand Dollars each by the Executor, Daniel F. Boone, and that they have en-

[fol. 24] tered into an agreement among themselves and that when each of the other three devisees, namely: Clarence McGraw Lightner, Alice Lightner Hopf, and Martha Lightner Boone, have each been paid an additional Ten Thousand Dollars by said Executor and/or Trustee is herein specifically authorized and directed in making settlement with said devisees to comply with this provision of this judgment.

This February 2nd, 1940.

Frank M. Armstrong, Judge Presiding.

IN SUPERIOR COURT OF POLK COUNTY

ANSWER OF DANIEL F. BOONE, AS TRUSTEE—August 5, 1941

The defendant, Daniel F. Boone, as Trustee, for answer to the complaint in this cause, says:

1. For answer to paragraph one, it is admitted that Clarence M. Lightner is a resident of the State of New Mexico, and that Theodore A. Lightner and Mrs. Alice Lightner Hopf are residents of the State of New York. On information and belief, defendant admits that Martha Lightner Boone is a resident of Polk County, North Carolina, and established such residence some time during the last eight months. Further answering, defendant denies that his minor daughter, Martha Penelope Boone, is a resident of Forsyth County, North Carolina, and denies that W. C. Hague has any right to represent said minor daughter as Next Friend. Further answering, defendant alleges that he is domiciled and is a resident of Washington, D. C., and that his minor children, including said minor daughter, have been in his custody for several years. Further answering, defendant alleges that his physical residence has been in Washington, D. C., since November 1, 1940, and that his domicile and legal residence have been in Washington, D. C., since June 23, 1941, and that he and his minor daughter are not, therefore, subject to the jurisdiction of courts other than those of his domicile and residence, namely: Washington, D. C.

2. For answer to paragraph two, defendant denies that [fol. 25] he is a resident of Forsyth County, North Carolina, and denies that he is now temporarily absent from said

county, having no intention to ever resume domicile or residence therein. Defendant further admits that he is in the military service of the United States, being a Captain in the United States Army, and is stationed in the office of the Under-Secretary of War in Washington, D. C. Defendant further alleges that he is permitted to select his own residence and has actually lived and resided, since November 1, 1940, at 208 Massachusetts Avenue, N. E., Washington, D. C., and has been under a lease expiring November 1, 1941. Further answering, defendant states that on June 23, 1941, he definitely gave up his legal residence and domicile in Forsyth County, North Carolina, and from that date on acquired a new domicile and legal residence in Washington, D. C.

3. For answer to paragraph 3, defendant admits the allegations therein contained, and further answering respectfully refers to the Wills of Clarence A. Lightner and his wife, Frances M. Lightner, which said Wills are of record in Polk County, North Carolina, and are incorporated herein by reference, and defendant alleges that there is no mention in either of said Wills of the $15,449.10 fund hereinafter referred to.

4. For answer to paragraph 4, defendant admits the allegations in said paragraph, and, further answering, alleges that the matters pertaining to the will of said Frances M. Lightner, deceased, in no way relate to the $15,449.10 fund turned over to defendant at the direction of Clarence A. Lightner for "general care and education of Martha Penelope Boone."

5. For answer to paragraph 5, defendant admits the allegations therein contained.

6. For answer to paragraph 6, defendant admits the allegations therein contained.

[fol. 26] 7. For answer to paragraph 7, defendant admits the allegations therein contained.

8. For answer to paragraph 8, defendant denies all of the allegations therein contained, and, further answering, states that the only arrangement by which the $15,449.10 fund was turned over to him was stated in a letter written by Clarence A. Lightner to Martha Lightner Boone, which

said letter was dated October 11, 1938, and which was turned over to defendant by said Martha Lightner Boone after her father, Clarence A. Lightner, passed on; that a true copy of said letter is annexed hereto marked Exhibit A, and made a part hereof by reference.

9. For answer to paragraph 9, it is admitted that after the death of Clarence A. Lightner his daughter, Martha Lightner Boone, received two checks from an insurance company, which two checks totaled $15,449.10. Further answering, defendant denies the balance of the allegations contained in this paragraph of the complaint, but states that the true facts were that when Martha Lightner Boone brought the two checks to him she said that she had received them from the insurance company and turned them over to the defendant with the original of the letter, a true copy of which is marked Exhibit "A" and annexed hereto, stating at the time she turned over the two checks to the defendant and said letter from Clarence A. Lightner to her that this was the insurance money that her father had provided for and that her father had wanted defendant to have the money to expend for the general care and education of their infant daughter, Martha Penelope Boone. Further answering, defendant states that all other allegations of this paragraph of the complaint are denied as being untrue.

10. For answer to paragraph 10 of the complaint, defendant alleges that the allegations therein contained are untrue and are therefore denied.

[fol. 27] 11. For answer to paragraph 11, defendant admits that no advisory committee has been consulted or informed regarding said fund, and, further answering, alleges that there never was any request or intention on the part of the creator of the fund, Clarence A. Lightner, that any advisory committee should be consulted, said Clarence A. Lightner leaving the matter entirely to the discretion of the defendant, as is expressly stated in the letter, a true copy of which is marked Exhibit A, and annexed hereto. All other allegations of paragraph 11 of the complaint are untrue and therefore denied.

12. For answer to paragraph 12, defendant admits that he has not consulted with said advisory committee, and, further answering, denies that there was ever any direction

or request on the part of said Clarence A. Lightner that any advisory committee be consulted. Further answering, defendant has the greatest respect for the Clerk of the Superior Court of Polk County, North Carolina, but defendant states that, by the terms of the document creating said fund, he is not bound to report to any Court, and, further, that he is domiciled and resides in Washington, D. C., and it would be a great hardship and a serious expense to employ auditors and accountants to report to the Clerk of the Polk County, North Carolina, Court. Defendant respectfully alleges that said Court is without jurisdiction over the said fund or defendant's management of the same for the reasons hereinbefore and hereinafter stated. Further answering, defendant alleges that he has consulted with various investment counsel and has kept an accurate record of investments and income and, as soon as he is discharged from Walter Reed Hospital, Washington. D. C., where he is still a patient, he will engage the services of a Certified Public Accountant to have an account made up and mail a copy to Martha Lightner Boone or her counsel, it being defendant's wish at all times to cooperate reasonably with Martha Lightner Boone in connection with this matter. Further, defendant alleges that it is most unfor- [fol. 28] tunate that litigation should arise over a matter of this kind when he has never received a request from Martha Lightner Boone or any of her counsel for a statement of this account, and particularly when both Martha Lightner Boone and defendant so definitely understood from the express instructions of Clarence A Lightner what was intended, and it now definitely appears to defendant that this litigation results in an unfortunate waste of money for both Martha Lightner Boone and defendant.

13. For answer to paragraph 13, defendant admits that he is not managing said fund pursuant to any directions in the Will of Frances M. Lightner because there are no directions in that Will related in any way to said fund, nor are there any directions in the Will of Clarence A. Lightner related in any way to said fund, as this is a separate and distinct voluntary trust created by Clarence A. Lightner to be administered according to the direction of said Clarence A. Lightner contained in the document marked Exhibit A, annexed hereto and made a part hereof by reference. Further answering, defendant again points out that

he and his infant daughter, Martha Penelope Boone, are domiciled and reside in Washington, D. C.; that their physical residence has been there since November 1, 1940, and their legal domicile there since June 23, 1941. Further answering, defendant denies any and all other allegations contained in paragraph 13 which have not been heretofore specifically answered.

14. For answer to paragraph 14, defendant admits that he has not found anything in the Will of Frances M. Lightner which in any way relates to his handling of the $15,449.10 found; and, further answering paragraph 14, this defendant denies that there are any grounds for plaintiffs to have any apprehension, and further denies that any of the plaintiffs have any specific interest in said fund and denies that plaintiffs are proper parties in interest [fol. 29] to bring this action. The defendant denies all other allegations in paragraph 14 of the complaint and alleges that they are untrue.

15. For answer to paragraph 15, defendant denies that any of the plaintiffs have any interest in any portion of the $15,449.10 fund or the corpus of the items which said funds have been placed in by defendant. It is further denied that in the event of the death of defendant's minor daughter, Martha Penelope Boone, that the plaintiffs, or any of them, would have any interest in said fund other than what would be given to them by the laws of descent and distribution of Washington, D. C., which is the residence and domicile of said Martha Penelope Boone.

16. For answer to paragraph 16, defendant, although having the highest respect for the Court of Polk County, North Carolina, alleges that he and his minor daughter, Martha Penelope Boone, are domiciled and reside in Washington, D. C., and respectfully alleges that the Polk County Court has no jurisdiction over his management of said fund for his minor daughter. Defendant, however, has planned and will send a copy of the report of said fund to Martha Lightner Boone when it is ready, and this will, of course, depend on when defendant is discharged from the Walter Reed Hospital where he is now a patient, and will depend on his ability to engage the services of a Certified Public Accountant and have an audit made. Again defendant points out to the Court that he has never been requested by word of

mouth or letter by Martha Lightner Boone, or by any one of the other plaintiffs, to supply them with any information concerning his management of said fund. Defendant again expresses his willingness to cooperate with Martha Lightner Boone in this matter and regrets that said Martha Lightner Boone feels it necessary to litigate something concerning which there is positively no need to litigate; that defendant in making this statement does not waive any rights which [fol. 30] he has in this matter, but only points out to the Court that he has exercised at all times good faith in caring for this fund and most certainly will continue to do so, and if he lived in Polk County, North Carolina, he would certainly be pleased to have the cooperation and supervision of the Polk County Court.

Defendant respectfully directs the Court's attention to the fact that these same parties named as plaintiffs in this action, represented by the same counsel, professed to have apprehension about defendant's care of the trust fund established in the Will of Frances M. Lightner amounting to some $40,000.00, and defendant, learning of said claimed apprehension, brought an action in the Polk County Superior Court to have the Will of Frances M. Lightner construed and particularly to pass on defendant's work as Trustee of said $40,000.00 fund, and said Court did fully examine all of the items pertaining to said fund and the corpus of the same, and, after so doing, entered an order approving what had been done by defendant in that matter; that said proceeding was entitled: "Daniel F. Boone, as Executor, v. Theodore A. Lightner, et al.", and was heard before the Honorable Frank M. Armstrong at that time being the presiding Judge of the January-February Term of the Superior Court of Polk County, North Carolina, the original file of which is a part of the records of this Court and to which reference is hereby made.

The defendant, further answering the complaint, avers:

A. That the corpus of the trust amounted to $15,449.10 at the time that it was turned over to defendant pursuant to the directions of Clarence A. Lightner to his daughter, Martha Lightner Boone, all of which is evidenced by the letter marked Exhibit A, a true copy of which is annexed hereto and made a part hereof by reference.

[fol. 31] B. Defendant alleges that when his wife, Martha Lightner Boone, turned over the proceeds of the insurance checks to him, which proceeds totaled $15,449.10, he accepted it as trustee pursuant to the terms of the letter of the creator of the trust, which said letter is marked Exhibit A and annexed hereto. Defendant recognizes in the care of this fund that he was given certain discretionary powers in handling the money and in spending it for the general care and education of his infant daughter, Martha Penelope Boone, and he has at all times had this in mind and continues to have it in mind. Defendant further alleges that since June 23, 1941, his legal residence and domicile have been Washington, D. C., and that for that reason and for the further reason that the trust created by Clarence A. Lightner was a voluntary trust not subject to the jurisdiction of any court or restricted in any way by the terms of any will; that the court should not direct defendant to be subject to its supervision in this matter. Defendant further states that he has not consulted with Theodore A. Lightner or Dr. A. B. McGraw not because he does not think well of their opinion, but because he has found it more convenient to talk with other men well qualified to give advice on investments, and for the further reason that there was no direction or requirement of Clarence A. Lightner under the terms of the letter by which the fund was created and turned over to defendant that he ever consult with Dr. A. B. McGraw or Theodore A. Lightner regarding the same.

C. Defendant further alleges that he has handled this fund as a reasonably prudent man would have handled it; that he has used his best judgment and good faith in this matter; that he has not dissipated one penny of the fund, nor has he made any withdrawal from the fund since the day the money was turned over to him. Defendant further alleges that as soon as he is discharged as a patient at Walter Reed Hospital, Washington, D. C., and has a little [fol. 32] time in which to engage a certified public accountant, that he plans to have a statement made up as previously stated in this pleading; defendant further alleges that he is at all times anxious to conduct the affairs of this fund in such a way that it will be for the best interest of his minor daughter, Martha Penelope Boone, but he expressly denies that any of the adult plaintiffs have any interest

in the estate, and again respectfully denies that the Superior Court of Polk County, North Carolina, has jurisdiction over this fund or defendant's management of the same.

Further answering in support of the statement frequently made in this pleading that defendant and his minor daughter are domiciled and reside in Washington, D. C., defendant alleges that he left North Carolina to take up his physical residence in the District of Columbia, in October 1940, and has lived there with his minor daughter and son at 208 Massachusetts Avenue, N. E., Washington, D. C., since November 1, 1940, under a lease which does not terminate until November 1, 1941.

Defendant further states that until June 23, 1941, he had intended to return to North Carolina at some time in the future, but that on that date, because of what took place in the Superior Court of Forsyth County, North Carolina, as well as the other matters hereinafter set forth, he concluded that he definitely would terminate all of his ties bearing on his previous domicile and legal residence in the State of North Carolina, and that he would have his domicile and legal residence at the same place of his physical residence, namely: The City of Washington, D. C., and that as further evidence of the change of domicile and legal residence from North Carolina to the District of Columbia, defendant respectfully directs the court's attention to the following matters:

1. That defendant has not exercised his right to vote in North Carolina since the last Presidential election and is [fol. 33] no longer entitled to vote in North Carolina, and has written to the proper authorities and requested that his name be taken off the roll of registered voters.

2. That he has vacated the office in which he had property stored at Winston-Salem, North Carolina, and has ceased paying rent on the same.

3. That he has resigned as a Director of the Stokesdale Commercial Bank, of Stokesdale, North Carolina.

4. That he, on June 24, 1941, began negotiations for the acquisition by purchase of a house and lot in Washington, D. C., and that he has, subsequent to that date, purchased said home which is now being completed and which defend-

ant expects to move into within the next two or three weeks.

5. That on June 24, 1941, he dictated and executed a new Will setting forth in said Will that his legal residence and domicile was Washington, D. C., and no longer Winston-Salem, North Carolina.

6. That defendant's minor son, Daniel L. Boone, aged 6, has been regularly enrolled in a private school in Washington, D. C., during the school year of 1940-1941, and is now in a summer school.

7. That defendant and his minor children have terminated their affiliations with churches in Winston-Salem, North Carolina, and since coming to Washington, D. C., in November 1940, have become affiliated with a church in Washington, D. C.

8. That defendant has been a member of a Masonic Lodge known as Federal Lodge No. 1, since 1927, and that said Lodge has its place of meeting and Lodge Hall in Washington, D. C., and defendant has regularly kept up his [fol. 34] membership in said Lodge since 1927, having in mind that some day he would make Washington, D. C., his place of legal residence and domicile which he has now done as of June 23, 1941. Defendant further states in this connection that prior to June 23, 1941, he had definitely expressed himself many times as being temporarily absent from North Carolina on military duty, but after the testimony had been finished on June 23rd, 1941, defendant then and there concluded that he would never again return to North Carolina to take up his legal residence and domicile but would in the future have his legal domicile and legal residence in Washington, D. C.

9. That defendant has requested the tax authorities of North Carolina to take his name off the personal property tax roll and by letter from said tax authorities has been advised that his name has been removed from the roll.

10. That defendant has, since June 23, 1941, disposed of other property holdings in the State of North Carolina, having in mind that his legal residence and legal domicile since June 23, 1941, is Washington, D. C., and no longer Winston-Salem, North Carolina.

11. That defendant has no intention of maintaining property interests in the State of North Carolina or of resuming legal residence or legal domicile there at any time in the future.

12. Defendant further has in mind that both he and his children have been seriously disgraced in North Carolina by the action of Martha Lightner Boone in that Martha Lightner Boone had improper relations with men at times when she was the wife of the defendant and that information regarding the same has been widely publicized in the newspapers throughout North Carolina, and that if there were no other reasons, of which there are many, defendant would still decline to return to North Carolina to make his physical residence, legal residence and legal domicile, or any of them, there.

[fol. 35] 13. Defendant further states that he is of the definite opinion and belief that his appointment as a Captain in the United States Army is likely of long duration, at least that his present appointment will prevail during the emergency confronting the country; and, due to the further fact that defendant received his legal education in the City of Washington, D. C., and has spent more years of his adult life in Washington, D. C., than he has in the State of North Carolina, and has more friends and acquaintances in Washington, D. C., than he has in North Carolina, that it will be undoubtedly a better place for him to live when he returns to civilian life after the emergency is over, and that in any event defendant will never again take up his physical residence, legal residence or legal domicile in North Carolina.

14. Defendant further says that in Washington, D. C., he has many business contacts, Army contacts, social contacts, contacts of personal nature with the leaders in all fields, and definitely feels that it is decidedly to his interest and to the interest of his children that he continue to make his legal residence and legal domicile in Washington, D. C., where he has maintained a home and has now acquired by purchase a home in a fine residential district where it will make a fine home for said minor children.

Wherefore, defendant prays that this cause of action be dismissed on the grounds hereinbefore stated, including the

ground that the courts of North Carolina do not have jurisdiction over the management of the voluntary trust fund created by Clarence A. Lightner, deceased, for the further reason that the defendant and his minor daughter, Martha Penelope Boone, have their physical residence, legal residence and legal domicile in Washington, D. C., and not in North Carolina, and that the defendant may have such other and further relief in the premises as may seem [fol. 36] just and proper including the awarding of costs to defendant.

Daniel F. Boone.

Dated: August 5, 1941.

Roy L. Deal, 1505 Reynolds Building, Winston-Salem, North Carolina, Attorney for Defendant.
Clifford M. Toohy, 1903 Dime Bank Building, Detroit, Michigan, of Counsel for Defendant.

(Verified).

EXHIBIT "A" TO ANSWER

Assignment and Request to Martha Lightner Boone

DEAREST MARTHA:

Under date of August 8th, 1938, I made requisition upon the New England Life Insurance Company to make you sole beneficiary of my Life Insurance Policies Nos. 167481 and 168553.

Realizing that under the terms of the Will of my beloved wife, there was no financial provision made for the care and education of your daughter born September 14, 1938, it is my wish that the proceeds from above mentioned Insurance Policies be transferred to my son-in-law, Daniel F. Boone, who is the Executor of my Will, and that he be given the proceeds from these policies to expend for the general care and education of my granddaughter, Martha Penelope Boone.

Affectionately yours, (Signed) Clarence A. Lightner.

Signed: W. D. Parris.

IN SUPERIOR COURT OF POLK COUNTY

REPLY

The plaintiffs, replying to the answer of the defendant, [fol. 37] without waiving the right to all of the denials which the law makes for them, and expressly reserving the right to insist on all such denials, say and allege:

1. That the allegations contained in paragraph 8 of said Answer are untrue and are denied, and in this connection the plaintiffs reiterate the allegations of their complaint in this regard and particularly the allegations of paragraph 8 thereof. The plaintiffs expressly deny that the letter therein referred to, of which Exhibit A, attached to the answer, is alleged to be a copy, was ever delivered to the plaintiff, Martha Lightner Boone, by her father, Clarence A. Lightner, or that said paper writing was ever delievered by her to the defendant. The plaintiffs further allege that none of them ever heard of said paper writing until they saw what purported to be a copy of same attached as Exhibit A to said answer. The plaintiffs further expressly allege that the agreement with respect to the establishment of said trust made between the said Clarence A. Lightner, Martha Lightner Boone and Daniel F. Boone was entered into prior to October 11, 1938, and prior to the birth of Martha Penelope Boone, which occurred September 14, 1938. In this connection, the plaintiffs further allege that the said paper writing referred to in said paragraph and in many subsequent paragraphs of said answer, was written by the defendant, Daniel F. Boone, without the knowledge or consent of the plaintiff, Martha Lightner Boone, and was presented by him to the said Clarence A. Lightner for his signature when he was confined to his bed, in a coma, at a time when he was without sufficient mental capacity to execute said paper writing. That the said paper writing was thereafter held by the said Daniel F. Boone and its existence and contents concealed from the said Martha Lightner Boone and the other plaintiffs herein until the filing of defendant's answer.

2. That the allegations contained in paragraph 9 of said answer, insofar as they are in conflict with the allegations of [fol. 38] plaintiff's complaint or with the denials set forth in paragraph one of this Reply, are untrue and are denied.

Wherefore, the plaintiffs, having fully replied to all matters which the law may not have denied for them, ask that the alleged paper writing, copy of which is attached to defendant's answer as Exhibit A, be set aside, and that the relief prayed for in the complaint be granted.

Massenburg, McCown & Arledge, J. E. Shipman,
Attorneys for Plaintiffs.

(Verified by Martha Lightner Boone.)

In Superior Court of Henderson County

Issues and Verdict

May-June Term 1942

1. Is the defendant, Daniel F. Boone, a trustee of the fund of $15,449.10, referred to in the complaint and answer?
Answer: Yes.

2. If so, is the said fund subject to the same terms and provisions set forth in the Will of Frances M. Lightner for the management and control of the trust fund for the other three grand-children, as alleged in the complaint?
Answer: Yes.

3. If so, has the defendant, as trustee, administered said trust fund as provided for in said Will?
Answer: No.

4. Has said defendant failed to administer said trust fund as by law required of trustees, as alleged in the complaint?
Answer: Yes.

5. What amount, if any, has the defendant received as dividends and profits on said funds?
Answer: $4,228.89.

[fol. 39] 6. Was Clarence A. Lightner, on October 11, 1938, without sufficient mental capacity to execute the paper writing alleged in defendants' answer, and copy thereof annexed thereto as Defendant's Exhibit No. 1, as alleged in the plaintiffs' Reply?
Answer: Yes.

In Superior Court of Henderson County

Judgment—May 26, 1942

This action was commenced in the Superior Court of Polk County, North Carolina, by the issuance of a summons and the filing of the complaint on June 21, 1941. The Sheriff of Forsyth County, N. C., (of which county the defendant was then a resident) served the summons and complaint on the defendant personally at Winston-Salem, N. C., on June 23, 1941. The court has jurisdiction of the parties and of the subject matter of the action.

The complaint alleges that the plaintiff, Martha Lightner Boone, turned over to the defendant the proceeds of two policies of insurance on the life of her late father, Clarence A. Lightner, in which she was beneficiary. There is no dispute about the amount, which is admitted to be $15,449.10. The complaint further alleges that said funds were to constitute a trust fund for the plaintiff, Martha Penelope Boone, subject to the same management, provisions and terms, as a trust fund created by the Will of Frances M. Lightner, the grandmother of Martha Penelope Boone, for her other three grandchildren, in which Daniel F. Boone, the defendant, was named trustee, with Dr. Arthur B. McGraw and Theodore A. Lightner, as Advisory Committee; that said Will had been construed by this Court in a judgment rendered by Judge Frank M. Armstrong, dated February 2, 1940; that the defendant had not rendered an accounting of said trust fund, and that the plaintiff's were apprenhensive that said fund was being mismanaged and dissipated. In the prayer the plaintiffs sought a decree to determine the provisions of the trust, an accounting, and the removal of the trustee in the event of mismanagement [fol. 40] or improper handling of the trust funds, together with other and further relief consistent with the oversight and protection by the court of the interests of the minor plaintiff.

The defendant duly filed an answer in which he admitted the receipt of the sum of $15,449.10 from Martha Lightner Boone, and that said sum constituted the proceeds of two policies of insurance on the life of Clarence A. Lightner, in which Martha Lightner Boone was named beneficiary. He admitted the trust character of the funds but denied that the terms and provisions of the trust were to be in accordance

with the Will of Frances M. Lightner and contended that the provisions of the trust were determined by a letter from Clarence A. Lightner to Martha Lightner Boone, dated October 11, 1938, a copy of which was made a part of the answer.

The plaintiffs filed a reply denying all knowledge of said letter and asserting that Clarence A. Lightner was without mental capacity on October 11, 1938, to execute the said paper writing.

This cause was regularly calendared for trial at the January-February Term 1942 of Polk County Superior Court, at which time the defendant, through his counsel, Roy L. Deal, Esq., of the Winston-Salem bar, made a motion for a continuance, which appears in the record. The court granted the continuance in a written order dated February 2, 1942, which is a part of the record, and in which the court transferred the cause to Henderson County Superior Court and gave notice in said order that the cause would be tried on May 25, 1942, the first day of the May-June 1942 Term of said Henderson County Superior Court, peremptorily setting the same to avoid undue delay to anyone. When said motion was argued, Mr. Deal stated that he expected to be called into service in the U. S. Army and that he would be unable to try the case and requested that the case be continued until May 25, 1942, in order to give the [fol. 41] defendant ample time to employ other counsel.

Upon the call of the calendar at the May-June 1942 Term of Henderson County Superior Court, the defendant, through R. R. Williams, Esq., of the Asheville, N. C. bar, lodged a motion for a continuance, which with the supporting affidavits is in the record. The court denied the motion and the order to this effect setting forth my findings of fact are in the record. The court finds as a further fact that the defendant has had ample time and opportunity to properly prepare his defense in this case and that his military service has not prevented him from doing this.

In a recent case (The Sylph 42 Fed. Sup. 354) Judge Moscowitz, U. S. District Judge for the Southern District of New York, in considering the provisions of the Soldiers' and Sailors' Civil Relief Act, Chap. 888, 3rd Session, Public No. 861, 76th Congress, Sec. 302, 50 U. S. C. A. Appendix S 532, said:

"Respondent had full opportunity to put in a defense although there appears that there is no defense."

In this case is the same situation—the defendant had full opportunity to prepare and put in his defense if he had one. From the depositions giving the records of his bank account and the ledger sheets showing his speculations with the trust funds, it appears that the defendant did not have a defense. His failure to properly handle the trust fund or to account for the same has not been affected in any way by reason of his military service. It is apparent that he has only sought to use the provisions of the Soldiers' and Sailors' Civil Relief Act as a shield for his wrong doing, and this Court, who once wore a U. S. uniform with pride does not intend for this to be done.

Upon the call of the case, a jury was empanelled to try the issues, and the following are the issues which were sub-[fol. 42] mitted to the jury, with the answers of the jury thereto:

1. Is the defendant, Daniel F. Boone, a trustee of the fund of $15,449.10, referred to in the complaint and answer?
Answer: Yes.

2. If so, is the said fund subject to the same terms and provisions set forth in the Will of Frances M. Lightner for the management and control of the trust fund for the other three grandchildren, as alleged in the complaint?
Answer: Yes.

3. If so, has the defendant, as trustee, administered said trust fund as provided for in said Will?
Answer: No.

4. Has said defendant failed to administer said trust fund as by law required of trustees, as alleged in the complaint?
Answer: Yes.

5. What amount, if any, has the defendant received as dividends and profits on said funds?
Answer: $4,228.89.

6. Was Clarence A. Lightner, on October 11, 1938, without sufficient mental capacity to execute the paper writing alleged in defendants' answer, and copy thereof annexed thereto as Defendants' Exhibit No. 1, as alleged in the plaintiffs' Reply?
Answer: Yes.

It is therefore, on motion of McCown & Arledge, and J. E. Shipman, attorneys for the plaintiffs, Considered, Ordered, Adjudged and Decreed:

1. That the defendant, Daniel F. Boone, received the sum of $15,449.10 from Martha Lightner Boone as a trust [fol. 43] fund for the education and benefit of Martha Penelope Boone, the daughter of said Daniel F. Boone and Martha Lightner Boone, subject to the same terms and provisions set forth in the Will of Frances M. Lightner for the management and control of the trust fund for the other three grandchildren, which will was construed in the judgment of Judge Frank M. Armstrong, presiding over the Polk County Superior Court, dated February 2, 1940.

2. That the said fund has been increased by dividends and profits in the sum of $4,228.89, and that the defendant, Daniel F. Boone, individually is accountable for the total of the two sums mentioned, that is to say, the total amount of $19,677.99.

3. That the said defendant has turned over and delivered to the Clerk of this Court, pursuant to the order made in this cause by the undersigned Judge, dated February 2, 1942, the following:

U. S. Postal Money orders aggregating $697.93
200 Shares North American Aviation, Inc., par $1.00 common Certificate #B88-033 and B 88-034
100 Shares The Baldwin Locomotive Works, par $13.00 common Certificate #NV 30828

—

C

500 Shares Curtis-Wright Corporation, par $1.00 common 5 certificates each for 100 Shares Certificates D25862-3-4-5-6
100 Shares The Greyhound Corporation, no par common Certificate #N 86916
U. S. Bonds as follows:
$100.00 Series D #C3097532D
$100.00 Series D #C3097533D.

4. That this Court takes judicial notice of the value of [fol. 44] the said U. S. Bonds, as stated on the face of the same, and of the value of the said stocks all of which are listed on the New York Stock Exchange and quoted daily,

and using the closing quotation of May 25, 1942, the court values said assets as follows:

U. S. Postal Money Orders	$ 697.93
100 Baldwin @ 10⅝	1,062.50
500 Curtis Wright @ 6⅛	3,062.50
100 Greyhound @ 11⅜	1,137.50
200 North American Aviation @ 10⅜	2,075,00
U. S. Bonds as follows:	
$100.00 Series D #C 3097532D	76.00
$100.00 Series D #C 3097533D	76.00
Total	$ 8,187.43

5. One of the remedies sought by plaintiffs is the removal of the defendant as trustee and the appointment of a substitute trustee. It was held by the North Carolina Supreme Court, in the case In Re Smith's Estate, 200 N. C. 272, 156 S. E. 494 (which was tried by the undersigned Judge in the Superior Court) that

"The creation of trusts and the rules by which the conduct of trustees is governed fall properly within the jurisdiction of courts of equity. It is but reasonable that these courts, after having called the equitable title into existence, should continue to exercise over it a constant care and supervision. Equity affords this protection by appointing and removing trustees, by superintending their discharge of the duties of the trust, by regulating their liability, by filling a vacancy or vacancies in the office of trustee, and finally, by affording the trustees, upon a proper application and upon proper cause shown, the advice and assistance of the court."

That this Court has the power of removal in this case cannot be doubted.

[fol. 45] The jury found that the defendant, as trustee, failed to administer the trust fund in accordance with the provisions of the Will of Frances M. Lightner and that the defendant failed to administer the trust fund as by law required of trustees. The Court is of the opinion and so holds, that this finding is sufficient to justify the removal of the defendant as trustee.

The Court is of the further opinion that this record shows specifically further acts of dereliction and malfeas-

ance on the part of the defendant in fulfilling his obligations as trustee. The record shows that the defendant deposited said trust funds in the Wachovia Bank and Trust Company of Winston-Salem, and subsequently withdrew practically the entire amount and used the same in marginal stock speculation on the New York Stock Exchange. In dealing in this manner, he received many checks from the stock brokers handling his accounts, redepositing some of them in the bank and then making withdrawals or using the checks for his personal purposes.

Such speculation on the part of the trustee is wrong. Under the laws of North Carolina, the trustee could not purchase said stocks with his trust funds. The bulk of the loss, however, is due to his wrongful withdrawal of the funds for his personal purposes. When called to book by the institution of this action, the trustee attempted technical and evasive tactics. In his answer, which was duly sworn to, he stated that he had not withdrawn any of the trust funds. The evidence proves the falsity of this. The Court finds the facts in accordance with the foregoing statements and concludes that the defendant, Daniel F. Boone, has mis-managed and improperly handled said trust fund; that he has dissipated and lost, through speculation and abstraction, a substantial part thereof; that he has not shown good faith and has not attempted to render a true accounting and that he is not a fit and suitable person to [fol. 46] act as trustee. It is, therefore, ordered that the said Daniel F. Boone be, and he is hereby, removed as trustee of the said fund and Martha Lightner Boone is hereby substituted as trustee in the place and stead of said Daniel F. Boone.

Let the substituted trustee give a bond in the sum of ten thousand dollars, to be approved by the Clerk of the Superior Court of Polk County, conditioned upon properly accounting for said fund. Upon the filing of said bond, Martha Lightner Boone is to hold, manage, and control the assets, constituting said trust in accordance with the provisions of the trust as herein set forth. Said trustee in the future is to file annual reports with the Clerk of the Superior Court of Polk County, it being directed that a copy of this judgment and of the bond duly certified to, be filed in said county.

6. From the amount of $19,677.99 for which Daniel F. Boone is accountable, is to be credited the said sum of $8,187.43, leaving the net sums for which Daniel F. Boone is accountable as $11,490.56, and judgment is hereby awarded against the said Daniel F. Boone, individually, and in favor of Martha Lightner Boone, as trustee for Martha Penelope Boone, in the said sum of $11,490.56.

7. The bonds and securities listed above in paragraphs three and four, together with all dividends or benefits thereon, and the proceeds of the money orders, are hereby transferred and set over and assigned to said Martha Lightner Boone, as trustee for Martha Penelope Boone, and all right, title, and interest of Daniel F. Boone therein is divested. The Clerk of this Court is hereby directed and instructed to deliver the same to said Martha Lightner Boone. The several corporations issuing said stocks and the respective transfer agents are hereby directed and required to make the transfers of said securities, that is to say, upon the presentation and surrender of the [fol. 47] above-mentioned securities and a certified copy of this judgment, the respective corporations are to issue like securities to Martha Lightner Boone, as trustee for Martha Penelope Boone.

8. It appearing to the Court that the services of the attorneys representing the plaintiffs in this action have been beneficial and advantageous in that said services have resulted, among other things, in recovering the assets above mentioned, and in obtaining the removal of the trustee, and that a fair and reasonable compensation for said services is the sum of eight hundred dollars, the said Martha Lightner Boone is hereby directed to pay to McCown & Arledge, and J. E. Shipman, the attorneys for the plaintiffs, the sum of eight hundred dollars out of the first moneys of said trust fund coming into her hands.

It is further ordered that the securities herein ordered to be turned over to Martha Lightner Boone, as trustee for Martha Penelope Boone, shall be held by said trustee until such time as in the opinion of said trustee the same can be sold advantageously and it is contemplated that such sale when made will be with the sanction of this Court (either the Resident Judge or Judge holding the Courts in the Eighteenth Judicial District approving the same) and

that hereafter the funds of this trust will be invested as is provided by law for the investment of trust funds. The fact that the securities ordered to be turned over to said substituted trustee are not securities in which trust funds may be invested under the applicable statutes shall not operate prejudicially to the substituted trustee, or to her bond, but said securities are to be held pending the further orders of this Court.

10. Let the costs be taxed against the defendant, Daniel F. Boone. Said costs are to include an allowance of $10.00 to W. C. Hague for his services as next friend of Martha [fol. 48] Penelope Boone, $25.00 to Mae A. White for her services in taking the deposition of David S. Paterson, and $2.50 to Henry F. Snow for his services in taking the deposition of G. M. Alspaugh. Said amounts are to be paid out of the trust fund pending the collection of the judgment and are to be paid to the plaintiffs who have advanced them, or to their counsel of record.

This 26th day of May, 1942.
H. Hoyle Sink, Judge Presiding.

In Superior Court of Henderson County

Exceptions and Appeal Entries—May 28, 1942

The defendant, through his counsel, Williams & Cocke, who have been employed by the defendant since the trial of the case to represent the defendant in this case, comes into Court on Thursday, May 28, A. D., 1942, and moves to set aside the verdict rendered herein. Motion overruled and the defendant excepts. The defendant excepted to the judgment signed herein and appealed to the Supreme Court. Notice of appeal given in open court and further notice waived. Appeal bond fixed at $250. Defendant is given 35 days from this date within which to serve case on appeal. Plaintiff given 35 days thereafter to serve counter-case or exceptions.

This 28th day of May, A. D., 1942.
H. Hoyle Sink, Judge Presiding.

[fol. 49] IN SUPERIOR COURT OF POLK COUNTY

ORDER CONTINUING CAUSE AND TRANSFERRING IT TO HENDERSON COUNTY.

This cause coming on for hearing on Monday, February 2, 1942, of the regular January-February Term of Superior Court of Polk County, State of North Carolina, and upon the defendant's motion for a continuance as set forth in the record, the Court heard arguments, statements and affidavits growing from and upon the question of continuing the cause, the motion for continuance is allowed, in the discretion of the Court.

The Court is of the opinion that it should at the earliest practical date ascertain the exact status of the trust fund referred to in the pleadings; the Court, therefore, without prejudice to the rights of the plaintiffs or the defendant, is of the opinion that the cause should be transferred to the County of Henderson, State of North Carolina, at the regular May-June Term 1942, Superior Court of said County; that the said transfer is ordered in the interest of the proper administration of justice and for the convenience of all parties concerned.

The Court finds as a fact that it is necessary and proper that no further transfer, sale, encumbrance or other disposition of the stocks or securities referred to in the deposition of Capt. Daniel F. Boone, dated August 15, 1941, alleged to be the property of the trust, should be made.

It is therefore, Further Ordered and Adjudged, that upon the 25th day of May 1942, that the said securities and each thereof, together with any money or evidence of indebtedness belonging to the said trust be delivered by the defendant, Daniel F. Boone, to the Clerk of the Superior Court of Henderson County, State of North Carolina, there to abide the further orders of this Court.

It is the opinion of this Court and the Court so finds as a fact, that the presence of the defendant, Capt. Daniel [fol. 50] F. Boone, at said trial is highly desirable, the Court further in this order informing counsel for plaintiffs and for defendant that at said hearing all issues arising upon the pleadings will be determined insofar as may be possible, particularly with respect to the handling and custody of the said trust fund.

As to whether the presence of the said Capt. Daniel F. Boone is necessary, the Court is leaving that to the sound discretion of the defendant and of his counsel of record.

In order that the said defendant may be fully advised, and that his superior officers may be fully advised of the importance of the litigation in question, it is directed that the Clerk of the Superior Court of Polk County, State of North Carolina, shall certify a copy of this order and forward the same to the Adjutant General of the United States Army, War Department, Washington, D. C., who shall, if he deems it necessary, submit it to such of his subordinates or superiors of the said Capt. Boone as he may deem proper.

The Clerk of the Superior Court of Polk County, North Carolina, will forthwith transfer the entire record of proceedings to the Clerk of the Superior Court of Henderson County, State of North Carolina, who will, in turn, docket the same upon the civil issue docket and set the case peremptorily, in order that no undue delay may result to anyone, on the 25th day of May, 1942.

This February 2, 1942.

H. Hoyle Sink, Judge Presiding.

To the above order, other than the portions thereof continuing the cause and directing its removal to Henderson County, the defendant excepts.

2/2/42.

H. Hoyle Sink, Judge."

This constitutes defendant's exception No. 1.

[fol. 51] In Superior Court of Henderson County

Statement of Receipts and Disbursements from January 6, 1939, to February 1, 1942, by Daniel F. Boone, Trustee for Martha Penelope Boone

Receipts

Jan. 5, 1939:

Received from Martha Lightner Boone, Exhibit A, attached hereto, entitled "Assignment and Request to Martha Lightner Boone," signed

by Clarence A. Lightner, together with two checks made payable to Martha F. L. Boone and endorsed "Martha F. L. Boone (Mrs. Daniel F. Boone)," in the total sum of (This sum deposited in the joint bank account of Daniel F. Boone and/or Mrs. Martha Lightner Boone on January 6, 1939.	$15,449.10
Dividends received from stocks	1,680.00
Total receipts	$17,129.10

Disbursements

March 8, 1939:	
Purchased 100 Shares The Greyhound Corporation Common Stock, Attached Certificate No. N86916. Net Cost (Dividends Received—$330.00)	$ 2,102.50
Oct. 19, 1939:	
Purchased 100 Shares, The Baldwin Locomotive Works, Common Stock, Attached Certificate No. NV 30828. Net Cost (Dividends received—None to date)	2,065.00
[fol. 52] Nov. 8, 1939:	
Purchased 500 Shares, Curtiss-Wright Corporation, Common Stock, Attached Certificates Nos. D258562, D258563, D258564, D258565 and D258566. Net Cost (Dividends received—$750.00)	5,320.00
Nov. 8, 1939:	
Purchased 200 shares, North American Aviation, Inc., Capital Stock. Attached Certificates Nos. B88-133 and B88-034. Net Cost (Dividends received—$600.00)	5,555.00
Mar. 8, 1941:	
Purchased $100.00 Series D, United States Savings Bonds, Certificate No. C3097533D. Net cost	75.00
Purchased $100.00 Series D, United States Savings Bonds, Certificate No. C3097532D. Net cost	75.00

Aug. 21, 1941:

Paid Norman L. Knauss, Court Reporter, for taking deposition of defendant in Washington, D. C., on Aug. 15, 1941 ..... 66.00

Aug. 16, 1941:

Paid Clifford M. Toohy, Attorney, Detroit, Michigan, for appearing and representing defendant in taking of deposition in Washington, D. C., on August 15, 1941. (This necessitated Mr. Toohy's absence from his Detroit office and being in Washington three days) .. 248.83

Nov. 3, 1941:

Paid Clifford M. Toohy, Attorney, Detroit, Michigan, for obtaining the services of Edward G. Bathon, Attorney, and appearing with Mr. Bathon in New York on November 3, 1941, at the taking of deposition of David [fol. 53] S. Patterson, on behalf of plaintiffs .. 175.00

Nov. 5, 1941:

Paid Clifford M. Toohy, Attorney, Detroit, Mich., for obtaining the services of Edward G. Bathon, Attorney, and appearing with Mr. Bathon in New York on November 5, 1941, at the taking of depositions, on behalf of the defendant, in this Trust Estate (This fee does not include services rendered in the taking of depositions in other cases on same date) 200.00

Oct. 9, 1941:

Paid to United Benefit Life Insurance Company, premium on Educational Endowment Insurance Policy on the life of Martha Penelope Boone. (Policy No. 311209 of the United Benefit Life Insurance Company, attached, is self-explanatory) 146.14

Nov. 12, 1941:

Paid William J. Flemming, Shorthand Reporter, New York, N. Y., for taking deposition on November 5, 1941, in this Trust Estate 32.25

From Aug. 4, 1941,
thru Jan. 26, 1942:

Paid Roy L. Deal, Attorney, Winston-Salem, N. C., for representing defendant (Trustee) in this estate 218.00

From July 1941,
thru Jan. 1942:

Expenses of Trustee in making necessary long distance telephone calls from Washington, D. C., to Attorneys in Detroit, Mich., Winston-Salem, N. C., and New York City 70.25

Nov. 7, 1941:

Expenses of Trustee in making trip to New York [fol. 54] City, at the taking of depositions in the Estate on November 3rd, and November 5th, 1941, (Only one-half of expenses charged and collected) 32.35

From July 1941,
thru Jan. 1942:

Miscellaneous expenses paid for statements, bookkeeping, stenographic services and postage 49.80

Expenses incurred since Judge Sink's order of February 2, 1942, are not included in this statement

	$16,431.17
Receipts	$17,129.10
Cash on hand as of February 1st, 1942	$ 697.93

This 20th day of May 1942.
(Signed) Daniel F. Boone, Trustee for Martha Penelope Boone."

And at the same time and before the convening of Court the defendant delivered to the Clerk of the Superior Court and received a receipt from the Clerk of the Superior Court for the following securities:

100 Shs. The Greyhound Corporation Common Stock, Certificate No. N86916.
100 Shs. The Baldwin Locomotive Works Common Stock, Certificate No. NV—C 30828.
500 Shs. Curtiss-Wright Corporation Common Stock, Certificates Nos. D258562, D258563, D258564, D258565, D258566.
200 Shs. North American Aviation, Inc., Capital Stock, [fol. 55] Certificate Nos. B88-033 and B88-034.
$100.00, Series D, United States Savings Bond, Certificate No. C3097533D.
$100.00, Series D., United States Savings Bond, Certificate No. C3097532D.

All of the foregoing were issued to Daniel F. Boone individually.

One United Benefit Life Insurance Company, Educational Policy No. 311209, on the life of Martha Penelope Boone with Daniel F. Boone named as beneficiary.

Money Order payable to Clerk of Court, Henderson Court for $697.93.

IN SUPERIOR COURT OF HENDERSON COUNTY

APPLICATION FOR CONTINUANCE—May 25, 1942

Now come the defendant, Daniel F. Boone, and invoking the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, prays that the Court continue the trial of this action until after the termination of his service in the Army of the United States, or until such time as he can properly conduct his defense and, in support of this application, the defendant respectfully shows to the Court:

1. The defendant is a Major in the United States Army, having been commissioned on August 18, 1925, and called into active service on November 8, 1940, by War Department Special Order No. 259, Paragraph 63, dated November 1st, 1940, and having been continuously in military serv-[fol. 56] ice since November 8, 1940, he is assigned to the International Division, Headquarters, Services of Supply,

at Washington, D. C. The work in said Division is very heavy, and full time and some extra time are required of all officers in said Division, including the defendant.

Prior to the declaration of War on December 8, 1941, the work in this Division was very heavy, but since the declaration of War the volume of work has been greatly increased. No leaves whatever have been granted, except in cases of serious emergency.

2. By reference to the pleadings in this action, it appears that the matters in issue have extended over a period of years and that they involved many personal transactions on the part of the defendant as to which the defendant's testimony will be of major importance. The trial of the action would require the bringing of some three witnesses to North Carolina from other states. Two of the witnesses are in the United States Army stationed outside of North Carolina, and the other witness resides some eight hundred miles out of North Carolina.

3. It will be noted that the defendant has pleaded in Paragraph A of his further defense of his answer a paper writing marked Exhibit A, which sets out the terms under which Clarence A. Lightner transferred said funds to the defendant, and that the plaintiffs in paragraph of their reply deny the existence and validity of said paper writing. A deposition by the defendant would be inadequate to protect his rights and interests, for the reason that the Court would not have the benefit of the defendant's personal appearance as a witness. Furthermore, in the trial of the action, it would be impossible to anticipate all of the testimony and contentions of the plaintiffs and their witnesses, and defendant's counsel would not be able properly to meet and rebut the contentions and evidence of the plaintiffs in the absence and without the immediate assistance of the defendant.

[fol. 57] 4. At the February 1942 Term of the Superior Court for Polk County, an order was made by His Honor, H. Hoyle Sink, in which the Court ordered in substance, that the defendant deliver to the Clerk of the Superior Court of Henderson County, State of North Carolina, the securities together with any money or evidence of indebtedness constituting the trust estate which is the subject matter of the litigation. The defendant will fully comply with

these provisions in the order of Judge Sink on May 25, 1942. Compliance with this order will definitely assure the Court that the trust estate of Martha Penelope Boone is, and will continue to be, safeguarded in every respect. The trial of the remaining issues in the case, which only relate to the management and the terms of the ultimate disposition of the estate may well await the time the defendant has completed his military service. In this connection, the defendant respectfully suggests to the Court that it would be to the advantage of the trust estate that the Court authorize the Clerk of the Superior Court at Henderson County to collect any income from the securities, pending the final determination of the issues in this action, which dividends and income are now being held by the respective corporation or obligors.

5. Furthermore, the defendant has employed two attorneys in this case, Mr. Clifford M. Toohy, of Detroit, Michigan, and Mr. Roy L. Deal of Winston-Salem, North Carolina; Mr. Toohy is definitely engaged at the present time in the trial of cases at Detroit which will require his presence in Court there for approximately thirty days. Mr. Deal, my only North Carolina attorney in this action, has been commissioned a Major in the Army of the United States and reported for active duty on May 13, 1942. This occurred less than two weeks prior to the time set for the trial of this action and too late for another local counsel to become familiar with the case. By reason of these circumstances, the ability of the defendant to defend this action [fol. 58] will be materially affected by reason of his military service, unless the court grants the stay herein applied for; his defense will also be materially affected by the absence of his counsel.

Wherefore, the defendant prays that the Court stay the trial of this action until the defendant can personally appear in Court, and certainly until such time as his present local counsel, Major Roy L. Deal, can obtain leave to attend the trial of the case.

Clifford M. Toohy, Roy L. Deal, Attorneys for Defendant.

(Duly verified by Daniel F. Boone, defendant).

Affidavit of Roy L. Deal

District of Columbia, ss:

I, Roy L. Deal, being first duly sworn, depose and say:

When this action was first instituted, Major Daniel F. Boone employed me as local counsel and Mr. Clifford M. Toohy, of Detroit, Mich., as counsel to defend this action for him. Mr. Toohy and I prepared the answer which is on file. On May 13, 1942, I was directed by the Adjutant General of the United States Army to report to Washington, D. C., for active duty as Major in the Army of the United States, which I did. It will, of course, be impossible for me to appear as attorney in the trial of any case during the time I am in the military service, unless special permission and leave are obtained for the purpose.

Leave is obtainable only in special emergency and I certainly would not assume to ask for leave at the present time, so soon after having reported for duty.

I respectfully submit that after the defendant has complied with the terms of the order of Judge Sink at the January Term of the Superior Court for Polk County, [fol. 59] there is not special need for an immediate trial of the case.

Roy L. Deal.

(Sworn to 5-20-42).

In Superior Court of Henderson County

Order—Filed May 28, 1942

On the opening of Court, this the 25th day of May, 1942, and upon the calling of the calendar the above-entitled action, having heretofore been peremptorily transferred and set in this Court by the undersigned Judge on the 2nd day of February 1942, in the County of Polk; the Court is again presented with a motion to continue the case, supported by the affidavit of the defendant, which shall be incorporated in this Order, together with that of his counsel, Honorable Roy L. Deal, and which motion to continue was based among other things upon the ground that the defendant was relying upon the Soldiers and Sailors Relief Act, and upon further grounds set forth therein.

The Court is of the opinion, and finds as a fact, it formerly being a soldier itself, and with much respect to said

Act, referred to above, that the defendant in this cause is deliberately and wilfully attempting to evade an ultimate determination of the issues involved in the litigation entitled as above, and is exercising his assumed right under the Act referred to above to avoid such determination.

The Court further finds as a fact that the Honorable Roy L. Deal, at the January-February Term of Superior Court of North Carolina, in Polk County, in open Court, requested that the action be not set until this date, stating at said time that he, the said Judge Deal, was expecting to be called immediately into military service, and that, therefore, it would be necessary for the defendant to procure [fol. 60] additional legal counsel.

The Court observes with respect to foreign counsel in the case, that there is no affidavit supporting the statement that foreign counsel could not be present, and the Court further finds as a fact that the foreign counsel has at no time intervened directly in this action before the undersigned Court.

The Court being of the opinion, and finding as a fact that the motion to continue is made after the defendant's refusel in one or more instances arising out of litigation respecting the subject matter and personnel involved in this action to appear in the Courts of North Carolina, even on citation for contempt, that the defendant is not upon the motion for continuance acting in good faith, and therefore, is not entitled to the protection provided for in the said Soldiers and Sailors Relief Act.

The Court further finds as a fact that Honorable R. R. Williams, of Asheville, N. C., being present and presenting the motion for continuance, has in all respects acted in good faith and with due diligence, and further that the said counsel, Hon. R. R. Williams, was consulted for the first time only three or four days prior to the setting of this Court, and the Court further finds as a fact from the statement of Mr. Williams that he was employed for the sole purpose of making the motion to continue as outlined above, and upon the ruling of the Court on this motion now states to the Court his purpose of declining to proceed in any respect further in the case.

Whereupon the motion to continue is denied with Exceptions duly noted by the defendant.

H. Hoyle Sink, Judge Presiding.

(Filed 5-28-42).

This constitutes Defendant's Exception No. 2.

[fol. 61] IN SUPERIOR COURT OF HENDERSON COUNTY

Thereupon, in the absence of the defendant and of any counsel representing the defendant, the Trial Judge proceeded to a trial of the case, at which time the following proceedings were had:

Examination of the Jury—As Ordered by the Court:

By Mr. J. E. Shipman, Attorney for Plaintiff:

Q. Gentlemen of the Jury, are any of you related by blood or marriage to Daniel F. Boone?

Q. Do any of you know him?

Q. This is a case in which the plaintiff is seeking to have him removed as Trustee of a trust fund, a trust fund in which he has been acting as Trustee of his young child, a little girl,—is there any reason why you couldn't sit and give both the plaintiff and the defendant a fair trial?

Q. Do any of you know the plaintiff, Mrs. Boone, a Miss Lightner, before her marriage—she lived in Tryon and lives there now; do any of you know her family? If you do hold up your hands?

By the Court: Gentlemen of the jury, ordinarily the selection of jurors to try issues born, or arising in litigation is left to counsel exclusively, but in the instant case the defendant is not present, and out of an abundance of precaution the court will examine the panel in order that both the plaintiff and the defendant may have twelve men to try the issues arising who are in no wise affected by any circumstances or subject matter within their previous knowledge or present information.

Examination of the jury on behalf of the defendant, By the Court:

Q. Counsel has stated to you that Mrs. Boone was Miss [fol. 62] Lightner, I believe from Polk County; is any member of the jury as it is now constituted related by blood or marriage to Mrs. Boone?

Q. Do you know of the family of Mrs. Boone?

Q. Or have you ever had any transaction with them, either by correspondence or by person?

Q. Gentlemen, the court further requests that if any juror would be in any wise influenced for or against the defendant, or for or against the plaintiff because of any communi-

cation or any circumstances arising in the present court relating to the motion to continue, please indicate it by holding up your hand and I shall be glad to discuss the matter further with you. The court cautions you in this respect that you will not be influenced by anything heard before the court if you were present and heard it, but only by the subject matter as it shall be introduced to you in open court, and upon which you will take the law from the court.

(The court passes the jury).

After the impanelling of the jury, and in the reading of the pleadings the Court requests the Clerk of the Superior Court to read the answer to the complaint.

By the Court: Gentlemen, the court will request the Clerk of the Superior Court, as a courtesy to the court and to the defendant, to read the answer that has been filed by the attorneys of record for the defendant.

By the Court: Gentlemen, the Court instructs you that the Clerk of Court is not interested in the litigation, but in order that you may be fully apprised of the questions arising in this action, the Court requests the Clerk to read the answer of the defendant.

The pleadings are read—the complaint by Mr. McCown, representing the plaintiffs, the answer by the Clerk of Court.

[fol. 63] In Supreme Court of Henderson County

Plaintiffs' Evidence

Offers in Evidence

Plaintiffs introduced in evidence paragraph 4 of the answer and the corresponding paragraph of the complaint.

The Court rules as follows:

The Court is of the opinion since the defendant is not present in court that the admissions should relate only to the will. The recollection of the court is that the defendant denies the allegation of the complaint to the effect that the terms of the will referred to in paragraph 4 are controlling on the trust fund in his possession.

At this point plaintiffs' counsel, Mr. McCown, reads above paragraph 4 of the answer to the jury, which refers to the will of Frances M. Lightner, deceased.

At this time the will above referred to in paragraph 4 of the complaint and answer was introduced and read to the jury, said will being annexed as a part of paragraph 4 of the complaint.

Plaintiffs Offer in evidence the first paragraph of defendant's Further Answer as follows:

"That the corpus of the trust amounted to $15,449.10 at the time it was turned over to the defendant pursuant to the directions of Clarence A. Lightner to his daughter, Martha Lightner Boone."

Martha Lightner Boone testified: My name is Martha Lightner Boone. I am the wife of Daniel F. Boone, the defendant. He and I are not living together and have not been for sometime. My father's name was Clarence Ashley Lightner. He is dead. He died December 7, 1938. Frances M. Lightner was my mother. She died in May 30, 1938, six months before my father's death. My mother had three grandchildren living at the time of her death. They were [fol. 64] Claudia Lightner, Teddy Lightner and Daniel Boone. Daniel Boone is my son and the other children are by brothers' children. I had a child born three months after my mother's death. Her name is Martha Penelope Boone and she was three years old her last birthday. She was born September 24, 1938, between my mother's and my father's death. After my mother's death I and my husband, Daniel F. Boone, had a conversation with my father with respect to Penelope. The conversation was sometime in August 1938. We were in my father's bedroom. He was sick at the time and was in Tryon. Major Boone suggested to my father that probably he would like to make some arrangement for the education of the baby that we were expecting within a month because of the fact that due to the terms of the will which Major Boone drew up for my mother to sign the children following her death were to be left out of this trust fund, that is, the grandchildren, and the amount of the educational trust fund stipulated in my mother's will was set at $40,000 because of the fact that mother expected to have four grandchildren when it would be administered and which would have been $10,000 each for their educational provisions; so Major Boone asked my father whether he would like to have some provision made where this child which we were expecting would have the education it was entitled to under my mother's will, and my father said,

"Yes, indeed", that when our baby arrived it should have the same advantages as provided for the others; and since the $40,000 left under the terms of the will for their education would amount to almost $15,000 each then he suggested that my father take his two life insurance policies which had been made to myself and my brothers and sister, for the education of our baby yet to be born; and both Major Boone and my father agreed that the trust fund which would be set up should be a trust fund carrying the same stipulations provided in my mother's will. My father said he felt very well satisfied in having such a fine advisory board to administer the trust fund. He mentioned the advisory board, Major Boone, Dr. McGraw and my brother, [fol. 65] Theodore. He said he thought the three should take the trust fund and it should be handled just as the other educational money was, I mean exactly like that under the will. I mean my mother's will. That conversation was in August. I think Major Boone received the money from insurance policies of my father after his death because he handled everything of a financial nature in my family. And he brought the checks from the policies to me to sign and turn them over to him to handle as a trust fund exactly like that under my mother's will. The policies were paid by the Insurance Company. The checks were made payable to me; and Major Boone asked me to endorse them so he could cash them. I believe they were for $14,449.10, something less than $15,000.00.

When I endorsed these checks and turned them over to him he said, "I will be glad to consult with the advisory board and handle this trust fund exactly like your mother provided for the other money to be handled." He told me that. Since he has been administering this trust fund he has not made any accounting to me. I am a party-plaintiff to this suit. As I understand it, my husband contends that the terms of the agreement for the setting up of a second trust fund were such that he was given the exclusive authority to handle that, and that he is not required to and has not accounted either to me or anyone else or to the courts.

The witness was handed a paper writing referred to in the defendant's answer and asked when was the first time that she saw the paper writing. The witness replied: "The first time I ever saw it was when it was filed in the answer to the suit we instituted last summer." I know my

father's hand writing. That is his handwriting, as his hand had to be guided the last two or three months of his life. It is a very shaky facsimile of his hand writing. At the time the insurance company honored the two policies on my father's life by issuing checks to me as the beneficiary named therein, I had not at that time seen the paper writ-[fol. 66] ing referred to and presented to me by the plaintiffs' counsel marked Defendant's Exhibit # 1, and attached to his answer. I had never heard of any such paper-writing. At the time I divested myself of the two checks that I received as the sole beneficiary of policies upon my father's life which I endorsed over to my husband, Major Boone, I hadn't at that time even seen the Exhibit alleged to have been signed by my father.

At this time the plaintiff introduced in evidence the paper writing above referred to as Defendant's Exhibit 1, for purpose of attack, which said Exhibit reads as follows:

DEFENDANT'S EXHIBIT 1

"Assignment and Request to Martha Lightner Boone:

October 11, 1938.

DEAREST MARTHA:

Under date of August 8th 1938, I made requisition upon the New England Life Insurance Company to make you sole beneficiary of my Life Insurance Policies Nos. 167481 and 168553.

Realizing that under the terms of the will of my beloved wife, there was no financial provision made for the care and education of your daughter born September 14th, 1938, It is my wish that the proceeds from above mentioned Insurance Policies be transferred to my son-in-law, Daniel F. Boone, who is the Executor of my Will, and that he be given the proceeds from these policies to expend for the general care and education of my grandaughter, Martha Penelope Boone.

Affectionately yours, (Sgd) Clarence A. Lightner.

(Sgd) W. D. Parris."

My father was a very sick man on October 11, 1938. He had a plaster cast in his left hip and on his arm. I would

say as to his mental condition he was in a state of prac-
[fol. 67] tically a coma, practically all the time, he was barely able to converse with anyone. At that time I do not think he had mental capacity to know the contents of that paper writing, what it was and its legal effect. I don't think he had any mental alertness at that time, he just barely recognized people.

Plaintiff then offered in evidence the deposition of G. M. Alspaugh, marked Plaintiff's Exhibit B, dated January 7, 1942.

By the Court:

The Court will permit this deposition and the cross-examination if counsel elects to do so.

The deposition is as follows:

PLAINTIFF'S EXHIBIT B

DEPOSITION OF G. M. ALSPAUGH

G. M. Alspaugh, being first duly sworn, deposes and says:

Direct examination:

My name is G. M. Alspaugh and my business address is Wachovia Bank & Trust Company, Winston-Salem, North Carolina. I am Supervisor of Tellers and Bookkeepers in the Commercial Department of Wachovia Bank & Trust Company and have been in that particular position for five or six years. I have been with the Wachovia Bank & Trust Company for twenty-eight years.

I am familiar with the records of accounts of depositors in the bank. The fifteen yellow papers which you hand me are copies of the original statements from December, 1938, to February 5, 1940, of the account of "Daniel F. Boone and/or Mrs. Martha Lightner Boone." The original records are kept in the regular course of business.

Plaintiff offered in evidence the following:

[fol. 68] PLAINTIFF'S EXHIBIT No. 1

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
December 1938
Winston-Salem

Copy

Checks Paid			Deposits	Date	Balance
	Balance from last statement			December 1	485.03
25.00				3	460.03-S
2.00	106.38	3.87			
16.00	4.83	13.00			
1.85	17.03			5	295.07-S
10.00	1.55	1.55			
28.16	2.06	22.43		8	229.32-S
6.00				9	223.32-S
14.00	50.00	12.00			
12.00				12	135.32-S
3.00				13	132.32-S
7.00				14	125.32-S
1000.00			2,500.00	17	1,625.32-S
16.36	1.00			19	1,607.96-S
25.00	25.00			20	1,557.96-S
40.00				22	1,517.96-S
10.00				23	1,507.96-S
10.00				27	1,497.96-S
10.00	10.00			28	1,477.96-S
1.60				30	1,476.36-S

[fol. 69] PLAINTIFF'S EXHIBIT No. 2

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
January 1939
Winston-Salem

Checks Paid			Deposits	Date	Balance
	Balance from last statement			January 1	1,476.36
2.50	25.00			4	1,448.86–S
92.09	5.23	12.66			
15.09				5	1,323.79–S
500.00			15,449.10	6	16,272.89–S
100.00				7	16,172.89–S
15.00	50.00	42.15		9	16,065.74–S
15.85				10	16,049.89–S
5.25	25.00			11	16,019.64–S
6.00				13	16,013.64–S
56.00				23	15,957.64–S
1.35TX					15,956.29–S

[fol. 70] PLAINTIFF'S EXHIBIT No. 3

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
February 1939
Winston-Salem

Copy

Checks Paid			Deposits	Date	Balance
	Balance from last statement			February 1	15,956.29
15.00				9	15,941.29–S
25.00				20	15,916.29–S
6.00	29.00	6.35	349.25	23	16,224.19–S
1.11					
6.48	1000.00	15.96			
25.00				24	15,175.64–S
5.00	2.00		1.79	25	15,170.43–S
25.00				27	15,145.43–S

[fol. 71] PLAINTIFF'S EXHIBIT No. 4

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
March 1939
Winston-Salem

Copy

Checks Paid			Deposits	Date	Balance
	Balance from last statement February 28				15,145.43
2.00				28	15,143.43 S
3.10			600.00	1	15,740.33 S
25.00				3	15,715.33 S
2.00	25.00	9.50			
20.00				6	15,658.83 S
3,498.00				7	12,160.83 S
25.00				8	12,135.83 S
2,313.00	25.00	2.00		9	9,795.83 S
.80	11.25			10	9,783.78 S
2.00	25.00			13	9,756.78 S
2.40	2.00	25.00		17	9,727.38 S
25.00				18	9,702.38 S
330.00				20	9,372.38 S
4.46	25.00			22	9,342.92 S
102.84				23	9,240.08 S
3.00	5.41	15.00			
145.11	6.00			24	9,065.56 S
25.00				25	9,040.56 S
20.00	275.70		200.00	27	8,944.86 S
6.00	25.75	4.00		28	8,909.11 S

[fol. 72] PLAINTIFF'S EXHIBIT No. 5

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
April 1939
Winston-Salem

Copy

Checks Paid			Deposit	Date	Balance
	Balance from last statement March 31				8,909.11
225.00	25.00	3.00		31	8,656.11
10.00	3.88			1	8,642.23–S
4.12	20.45			3	8,617.66–S
33.32	81.35	25.00			
3.19	16.71	1,300.00			
15.63	12.00		450.00		
			102.00	4	7,682.46–S
7.15	450.00			5	7,225.31–S
33.70	40.00	7.00		6	7,144.61–S
10.95	12.00	25.00		7	7,096.66–S
6.71	25.00	1,100.00			
40.00	16.25	5.00			
25.00	7.00			11	5,871.70–S
25.00	39.24	10.00			
332.19	82.50			15	5,382.77–S
5.00	25.00			17	5,352.77–S
125.00	9.95			18	5,217.82–S
3,535.00				19	1,682.82–S
9.76				21	1,673.06–S
8.00				24	1,665.06–S
64.70				26	1,600.36–S
2.50	25.00			27	1,572.86–S

[fol. 73] PLAINTIFF'S EXHIBIT No. 6

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel,
Winston-Salem, N. C.

Statement for
the month of
May 1939
Winston-Salem

Copy

Checks Paid		Deposit	Date	Balance
	Balance from last statement		April 31	1,572.86
1.03	4.00	9.36	1	1,556.97-S
1.50				
5.00	72.54		2	1,479.43-S
2.61			3	1,476.82-S
19.60	14.72		4	1,442.50-S
30.00			5	1,412.50-S
20.00	5.00		6	1,387.50-S
3.00			8	1,384.50-S
10.00	15.00		9	1,359.50-S
23.50	25.00	5.95	11	1,305.05-S
2.60			13	1,302.45-S
6.00			15	1,296.45-S
31.75			16	1,264.70-S
5.00			18	1,259.70-S
73.79	8.00		22	1,177.91-S
4.80	40.00		25	1,133.11-S
25.00			27	1,108.11-S
5.00	3.00		29	1,100.11-S

[fol. 74] PLAINTIFF'S EXHIBIT No. 7

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel,
Winston-Salem, N. C.

Statement for
the month of
June 1939
Winston-Salem

Copy

Checks Paid		Deposit	Date	Balance
	Balance from last statement		May 31	1,100.11
50.00			31	1,050.11–S
3.00	5.98	3.35	1	1,037.78–S
8.95			2	1,028.83–S
10.00	3.60	5.00	3	1,010.83–S
2.00E			7	1,008.83–S
38.50	101.78	20.52	8	848.03–S
10.00			10	838.03–S
25.00			14	813.03–S
7.00			16	806.03–S
59.00	3.00		19	744.03–S
36.00			20	708.03–S
25.00			22	683.03–S
10.00	12.00		24	661.03–S
100.00			26	561.03–S
25.00			28	536.03–S

[fol. 75] PLAINTIFF'S EXHIBIT No. 8

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
July 1939
Winston-Salem

Copy

Checks Paid			Deposits	Date	Balance
	Balance from last statement June 31				536.03
50.00	16.05		80.67	30	550.65–S
55.00	12.00	3.50		1	480.15–S
5.27				5	474.88–S
5.50				6	469.38–S
22.21				7	447.17–S
3.00	2.28	25.00		8	416.29–S
.40	50.36			10	365.53–S
9.23	13.00			11	343.30–S
13.95					
2.88	161.82		200.00		
			1000.00	12	1,364.65–S
3.35	2.88	22.50		13	1,335.92–S
50.00				14	1,285.92–S
8.00				15	1,277.92–S
42.50	2.00			17	1,233.42–S
25.00				19	1,208.42–S
55.00				21	1,153.42–S
20.45				24	1,132.97–S
2.88				26	1,130.09–S
51.00	50.00			28	1,029.09–S
12.90	25.00			29	991.19–S

[fol. 76] PLAINTIFF'S EXHIBIT No. 9

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
August 1939
Winston-Salem

Copy

Checks Paid		Deposits		Date	Balance
	Balance from last statement July 31				991.19
50.00				1	941.19–S
38.65	18.33			2	884.21–S
22.26	12.40			3	849.55–S
8.88				4	840.67–S
5.00				5	835.67–S
24.00	25.00			7	786.67–S
1.00SC				11	785.67–S
25.41	25.00	10.00		12	725.26–S
4.95	16.84	1000.00	2,714.02	14	2,417.49–S
1000.00				15	1,417.49–S
500.00				16	917.49–S
35.00				17	882.49–S
50.00	25.00	4.00		21	803.49–S
25.00	5.00			25	773.49–S
2.00				26	771.49–S
10.00	25.00			28	736.49–S
22.55	55.00			29	658.94–S

[fol. 77] PLAINTIFF'S EXHIBIT No. 10

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
September 1939
Winston-Salem

Checks Paid		Deposits	Date	Balance
	Balance from last statement August 31			658.94
3.61	43.36		1	611.97–S
1.50			5	610.47–S
18.66			7	591.81–S
6.00			9	585.81–S
23.90			12	561.91–S
11.00			15	550.91–S
350.00			22	200.91–S
16.55			23	184.36–S
10.00			26	174.36–S

[Fol. 78] PLAINTIFF'S EXHIBIT No. 11

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone, and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
October 1939
Winston-Salem

Copy

Checks Paid			Deposits	Date	Balance
Balance from last statement September 31					174.36
10.00				2	164.36-S
49.49			1,000.00	3	1,114.87-S
1.94	18.23			4	1,094.70-S
5.00	65.00		60.00	5	1,084.70-S
4.70	41.00	10.00			
14.22	5.65			6	1,009.13-S
15.00				7	994.13-S
2.00	7.65			9	984.48-S
35.46				11	949.02-S
33.76	3.50	200.00		13	711.76-S
106.51				14	605.25-S
			189.45	18	794.70-S
2.00				19	792.70-S
10.00				23	782.70-S
78.20				25	704.50-S
11.33			100.00		
			316.00	27	1,109.17-S
4.20	5.00			30	1,099.97-S

[fol. 79] PLAINTIFF'S EXHIBIT No. 12

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
November 1939
Winston-Salem

Copy

Checks Paid			Deposits	Date	Balance
	Balance from last statement October 31				1,099.97
2.96				1	1,097.01–S
35.00				2	1,062.01–S
25.79				3	1,036.22–S
7.31	3.00	6.24		4	1,019.67–S
2250.00	10.00	10.28			
6.25			2,300.00	6	1,043.14–S
26.00	97.15	13.67		7	906.32–S
35.25				8	871.07–S
8.19				9	862.88–S
466.00	225.00			10	171.88–S
5.00	25.00			13	141.88–S
			1,000.00	15	1,141.88–S
50.00				17	1,091.88–S
25.00	10.00			20	1,056.88–S
30.00				25	1,026.88–S
10.00	25.00			27	991.88–S
10.61				28	981.27–S

[fol. 80] PLAINTIFF'S EXHIBIT No. 13

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
December 1939
Winston-Salem

Copy

Checks Paid			Deposits	Date	Balance
Balance from last statement November 29					981.27
8.25				1	973.02–S
100.00				4	873.02–S
5.12				5	867.90–S
15.00				7	852.90–S
7.55				8	845.35–S
46.13	5.00	1.24		12	792.98–S
5.71	8.26	13.40			
11.44				14	754.17–S
6.00				15	748.17–S
6.10			25,100.00	16	25,842.07–S
10.00			300.00	18	26,132.07–S
.63E	15,000.00			19	11,131.44–S
5000.00	3.00			20	6,128.44–S
5000.00				22	1,128.44–S
			200.30	26	1,328.74–S

[fol. 81] PLAINTIFF'S EXHIBIT No. 14

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
January 1940
Winston-Salem

Copy

Checks Paid			Deposits	Date	Balance
Balance from last statement December 30					1,328.74
21.80				30	1,306.94–S
3.00	41.23	10.00		2	1,252.71–S
206.30				3	1,046.41–S
42.65	8.03			4	995.73–S
27.29	6.08			5	962.36–S
10.69	4.12			6	947.55–S
10.00				8	937.55–S
10.00			680.00	10	1,607.55–S
15.00	10.00			11	1,582.55–S
25.00	4.55	8.60		12	1,544.40–S
.50E	11.01			13	1,532.89–S
10.00			2000.00	15	3,522.89–S
3000.00	3.00			16	519.89–S
2.97TX				16	516.92–S
5.00	25.00			17	486.92–S
			322.00	20	808.92–S
25.00				22	783.92–S
500.00				23	283.92–S
1.41	10.00	20.00		27	252.51–S
50.00	10.00			29	192.51–S

[fol. 82] PLAINTIFF'S EXHIBIT No. 15

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
February 1940
Winston-Salem

Copy

Checks Paid	Deposits	Date	Balance
	Balance from last statement	January 31	192.51
192.51		5	.00-S

Cross-examination:

The ledger sheets produced do not include the account during its entire period with the bank. The account existed prior to the date of the first exhibit. It was not continued after the last date shown there. It was closed on February 5, 1940. I believe it was. The last statement here shows it. It was closed on the 5th day of February 1940, that is where it ceased. It was opened in 1938, I believe; I am not positive about the correct date on that. The account is headed:

"Mr. Daniel F. Boone and/or Mrs. Martha Lightner Boone"

and the bank honored checks drawn by either of these persons on the account.

The plaintiffs offered in evidence the Deposition of David S. Patterson, marked Plaintiffs' Exhibit C, which deposition reads as follows:

[fol. 83] PLAINTIFFS' EXHIBIT C

DEPOSITION OF DAVID S. PATTERSON

David S. Patterson testified as follows: I am David S. Patterson living at 126 DeHart Place, Elizabeth, New Jersey. I am an accountant. I am employed by Merrill, Lynch, Pierce, Fenner & Beane, as Chief Accountant. I am familiar with all of the records of my employers. The firm

of Merrill, Lynch, Pierce, Fenner & Beane is a consolidation of other brokerage houses, they are stock brokers and members of the New York Stock Exchange. E. A. Pearce & Company, Merrill, Lynch, Cassatt & Company, Fenner & Beane, Fuller Rodney & Company were consolidated to create the present firm of Merrill, Lynch, Pierce, Fenner & Beane.

I am familiar with the account of Daniel F. Boone. I will produce all of the accounts of Daniel F. Boone with my company from December 7, 1938, to date. The twenty pages you show me are photostatic copies of the original ledger in the firm of Merrill, Lynch, Pierce, Fenner & Beane from March 7, 1939, to August 29, 1941. This account was closed August 8, 1941. The address is changed on this account—on the statement for November 1940, to General Delivery, Washington, D. C., and on the December statement it was changed again to Capital Towers, 208 Massachusetts Avenue, N. W., Washington, D. C. The number 81,324,172 is only descriptive of the account in the period, because from time to time we change the numbers of our accounts. The twenty pages are true copies of the ledger of E. A. Pearce & Company and its successors, Merrill, Lynch, E. A. Pearce & Company, Fenner & Beane, Cassatt & Company. The record shows the continuing firm of E. A. Pearce & Company and all accounts in the merger from the time of this merger. We do not take over old records of any merged firm; they remain with the liquidating firm. The twenty pages represent copies of the account of Daniel F. Boone with E. A. Pearce & Company. These records were kept in the regular course of business.

[fol. 84] Exhibits A-1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 were marked for identification.

Plaintiff offered said exhibits in evidence, as follows:

EXHIBIT A-1

WS 81324

172

Ledger
In Account with E. A. Pierce & Co.
40 Wall Street
New York, N. Y.

Mr. Daniel F. Boone
Robert E. Lee Hotel
Winston-Salem, N. C.

March 1939

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
100		Curtiss Wright	7	6½	660.00		
100		United Gas Improvement	7	13	1,314.00		
		Check	7	JE		3,498.00	
100		Greyhound New 1936	8	20⅛	2,102.50		
100		Pennsylvania RR	8	22⅞	2,302.50		
100		Western Union Tel	8	23½	2,365.00		
100		Glenn L. Martin Com	9	36	3,616.00		
		Check	9	JE		2,313.00	
100		Republic Steel	10	21½	2,165.00		
		Interest at 3¾%	27		13.94		
		Security Position					8,727.94*
100		Curtiss Wright					
100		Greyhound New 1936					
100		Glenn L. Martin Com					
100		Pennsylvania RR					
100		Republic Steel					
100		United Gas Improvement					
100		Western Union Telegraph					

[fol. 85]

EXHIBIT A-2

WS 81324

172

Ledger
In Account with E. A. Pierce & Co.
40 Wall Street
New York, N. Y.
April 1939

Mr. Daniel F. Boone
Robert E. Lee Hotel
Winston-Salem, N. C.

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance March 31st			8,727.94		
		100 Greyhound Corp	1	Div		20.00	
500		Packard Motor Car	4	3⅓	1,785.00		
		Check	4	JE		1,300.00	
		Check	11	JE		1,100.00	
100		Chesapeake & Ohio	18	32	3,216.00		
100		Greyhound New 1936	18	17⅛	1,726.50		
100		R J Reynolds Tob Co B	18	38¼	3,891.00		
		Check	19	JE		3,535.00	
		Interest at 3¼%	26		31.33		
		Security Position					13,422.77*
100		Chesapeake & Ohio					
100		Curtiss Wright					
200		Greyhound New 1936					
100		Glenn L. Martin Com					
500		Packard Motor Car					
100		Pennsylvania RR					
100		Republic Steel					
100		R J Reynolds Tob B					
100		United Gas Improvement					
100		Western Union Telegraph					

[fol. 86]

EXHIBIT A-3

WS 81324

172

Ledger
In Account with E. A. Pierce & Co.
40 Wall Street
New York, N. Y.

Mr. Daniel F. Boone
Robert E. Lee Hotel,
Winston Salem, N. C.

May 1939

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance April 30th			13,422.77		
		Check	5	JE	520.51		
		Mailing Charge	5		.22		
5		General Motors Corp	5	Rec			
10		Greyhound New 1936	5	Rec			
25		The Aviation Corp N	5	Rec			
		5 General Mot Corp	8	44		214.74	
	10	Greyhound New 1936	8	18		174.29	
	25	The Aviation Corp N	8	5½		131.70	
		100 Reynolds Tob B	15	Div		50.00	
		Check	16		50.00		
		Interest at 3¾%	26		42.09		
		Security Position					13,464.86
100		Chesapeake & Ohio					
100		Curtiss Wright					
200		Greyhound New 1936					
100		Glenn L. Martin Com					
500		Packard Motor Car					
100		Pennsylvania RR					
100		Republic Steel					
100		R J Reynolds Tob B					
100		United Gas Improvement					
100		Western Union Telegraph					

[fol. 87]

EXHIBIT A-4

WS 81324

172

Ledger
In Account with E. A. Pierce & Co.
40 Wall Street
New York, N. Y.

Mr. Daniel F. Boone
Robert E. Lee Hotel
Winston Salem, N. C.

June 1939

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance May 31st			13,464.86		
		Interest at 3¾%	27		43.47		
		Check	30		25.00		
		100 United Gas Imp	30	Div		25.00	
		Security Position					13,508.33*
100		Chesapeake & Ohio					
100		Curtiss Wright					
200		Greyhound New 1936					
100		Glenn L. Martin Com					
500		Packard Motor Car					
100		Pennsylvania RR					
100		Republic Steel					
100		R J Reynolds Tob B					
100		United Gas Improvement					
100		Western Union Telegraph					

75

[fol. 88]

EXHIBIT A-5

WS 81324

172

Mr. Daniel F. Boone
Robert E. Lee Hotel
Winston Salem, N. C.

Ledger
In Account with E. A. Pierce & Co.
40 Wall Street
New York, N. Y.
July 1939

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance June 30th					
		Check	3		13,308.33		
		200 Greyhound Corp	3	Div	90.00		
		100 Ches & Ohio	3	Div		40.00	
100		Southern Pacific	25	15⅜	1,551.50	50.00	
		Interest at 3¾%	26		42.20		
	100	United Gas Improvement	28	13½		1,328.97	
		Security Position					13,773.06*
100		Chesapeake & Ohio					
100		Curtiss Wright					
200		Greyhound New 1936					
100		Glenn L. Martin Com					
500		Packard Motor Car					
100		Pennsylvania RR					
100		Republic Steel					
100		R J Reynolds Tob B					
100		Southern Pacific					
100		Western Union Telegraph					

[fol. 89]

EXHIBIT A-6

WS 81324

172

Ledger
In Account with E. A. Pierce & Co.
40 Wall Street
New York, N. Y.
August 1939

Mr. Daniel F. Boone
Robert E. Lee Hotel
Winston Salem, N. C.

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance July 31st			13,773.06		
100		Natl Dairy Com	7	18	1,814.00		
100		Paramount Pictures	7	10	1,014.00		
100		Timken Detroit Axle	7	14⅞	1,501.50		
		CLeck	7	JE		1,000.00	
		Check	15	JE	50.00		
		100 Reynolds Tob B	15	Div		50.00	
		Interest at 3¾%	28		50.75		
		Security Position					17,153.31 Dr.
100		Chesapeake & Ohio					
100		Curtiss Wright					
200		Greyhound New 1936					
100		Glenn L Martin Com					
100		Natl Dairy Com					
500		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Republic Steel					
100		R J Reynolds Tob B					
100		Southern Pacific					
100		Timken Detroit Axle					
100		Western Union Telegraph					

77

[fol. 91]

EXHIBIT A-8

WS 81324

172

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From Aug 31 1940
to Sep 27 1940

Mr. Daniel F. Boone
Robert E. Lee Hotel
Winston-Salem, N. C.
No. 2 Acct.

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance August 30th			11,038.44		
		100 Otis Elevator	20	Div		25.00	
		Int to 9-21 3¾%	24		32.17		
							11,045.61 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Southern Pacific					

[fol. 92]

EXHIBIT A–9

80

WS 81324

172

Mr. Daniel F. Boone
Robert E. Lee Hotel
Winston Salem, N. C.

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From Sep 28 1940
to Oct 25 940

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Sept 27th			11,045.61		
		Check 9 30	1		25.00		
		200 Greyhound Corp	1	Div		50.00	
		100 Paramount	1	Div		15.00	
		100 Natl Dairy	1	Div		20.00	
	100	Pennsylvania RR	4	23¼		2,302.95	
		Check 10 3	4		1,400.00		
		Int to 10 19 3¾%	23		30.68		
							10,113.34
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Packard Motor Car					
100		Paramount Pictures					
100		Southern Pacific					

[fol. 93]

EXHIBIT A-10

698

81324

157

Capt Daniel F. Boone
c/o General Delivery
Washington, D. C.

No. 2 Acct.

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From Oct 26 1940
to Nov 29 1940

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance October 25th			10,113.34		
		Check 10-28	29		85.00		
		Int to 11-13 3/3/4%	13		25.41		
	100	Baldwin Locomotive	13	JE		10,223.75	
	500	Curtiss Wright	13	JE			
	100	Natl Dairy Com	13	JE			
	200	Greyhound Corp 1936	13	JE			
	100	Natl Gypsum $1 Par	13	JE			
	200	North Amer Aviation	13	JE			
	100	Otis Elevator	13	JE			
	100	Packard Motor Car	13	JE			
	100	Paramount Pictures	13	JE			
	100	Southern Pacific	13	JE			
		T FO to Wash Office	13				0.00

81

[fol. 94]

WD 34342

EXHIBIT A-11

157

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From Oct 26 1940
to Nov 29 1940

Customer's No. 34342

Mr. Daniel F. Boone
c/o General Delivery
Washington, D. C.

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
100		Baldwin Locomotive	13	JE	10,223.75		
500		Curtiss Wright	13	JE			
200		Greyhound Corp 1936	13	JE			
100		Natl Dairy Con	13	JE			
100		Natl Gypsum $1 Par	13	JE			
200		North Amer Aviation	13	JE			
100		Otis Elevator	13	JE			
100		Packard Motor Car	13	JE			
100		Paramount Pictures	13	JE			
100		Southern Pacific	13	JE			
		TFO FRM Winston-Salem	13				
100		Pennsylvania RR	13	25⅛	2,552.50		
	100	Pennsylvania RR	14	25		2,477.95	
		Check 11 19	20		500.00		
		Int to 11 23 3¾%	27		11.14		
							10,809.44 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Paramount Pictures					
100		Southern Pacific					

[fol. 95]

EXHIBIT A-12

WD 34342

157

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From Nov 30 1940
to Jan 3 1941

Capt. Daniel F. Boone
Capitol Towers
208 Massachusetts Ave., N. W.
Washington, D. C.

Customer's No. 34242

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Nov 29th			10,809.44		
		500 Curtiss Wright	14	Div		250.00	
		100 Natl Dairy Prod	16	Div		20.00	
		Check 12 16	17		250.00		
		100 Otis Elevator	20	Div		40.00	
		Check 12 19	20		20.00		
		Check 12 21	23		40.00		
		100 Paramount Pic	24	Div		15.00	
		200 No Amer Aviation	24	Div		150.00	
		100 Natl Gypsum	26	Div		40.00	
		200 Greyhound Corp	26	Div		90.00	
		Check 12 26	27		200.00		
		Check 12 27	28		130.00		
		Int to 12 28 3¼%			39.16		
							10,883.60 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Packard Motor Car					
100		Paramount Pictures					
100		Southern Pacific					

[fol. 96]

EXHIBIT A–13

WD 34342

Capt. Daniel F. Boone
Capital Towers
208 Massachusetts Ave., N. W.
Washington, D. C.

157

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From Jan 4 1941
to Jan 31 1941

Customer's No. 34342

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance January 3rd			10,893.60		
		Check 1 4	6		433.00		
	100	Paramount Pictures	7	11		1,082.92	
		Int to 1 25 2½%	28		20.35		
							10,254.03 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Packard Motor Car					
100		Southern Pacific					

[fol. 97]

EXHIBIT A-14

WD 34342

157

Ledger
In Account with Merrill Lynch
E. A. Pierce & Cassatt, New York
From Feb 1 1941

Capt. Daniel F. Boone
Capital Towers
208 Massachusetts Ave., N. W.
Washington, D. C.

Customer's No. 34342

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Jan 31st			10,254.03		
		Int. to 2 22 2½%	16		19.93		
							10,273.96 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Packard Motor Car					
100		Southern Pacific					

[fol. 98]

EXHIBIT A-15

WD 34-342

157

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From Mar 1 1941
to Mar 28 1941

Capt. Daniel F. Boone
Capital Towers
208 Mass. Ave., N. W.
Washington, D. C.

Customer's No. 34342

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Feb 28th					
					10,263.96		
		100 Otis Elevator	20	Div		20.00	
		Check 3 20	21		20.00		
		Int to 3 22 2½%	25		19.97		
							10,293.93 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Packard Motor Car					
100		Southern Pacific					

[fol 99]

EXHIBIT A-16

WD 34-342

156

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From March 29 1941
to April 25 1941

Capt. Daniel F. Boone
Capital Towers
206 Mass. Ave., N. W.
Washington, D. C.

Customer's No. 34342

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance March 26th			10,293.93		
		100 Natl Dairy Prod	1	Div		20.00	
		200 Greyhound Corp	1	Div		50.00	
		Check 4 2	3		70.00		
	100	Natl Dairy Com	8	13¼		1,302.97	
	100	Natl Gypsum $1 Par	8	7⅓		698.43	
	100	Otis Elevator	8	16		1,577.96	
	100	Southern Pacific	8	11		1,077.97	
		Int to 4 19 2½%	22		17.90		
		Check 4 23	24			800.00	
							6,714.59 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
200		North Amer Aviation					
100		Packard Motor Car					

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[fol. 100] EXHIBIT A-17

WD 34-342

156

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From Apr 26 1941
to May 30 1941

Capt. Daniel F. Boone
Capital Towers
208 Mass. Ave., N. W.
Washington, D. C.

Customer's No. 34342

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance April 25th			6,714.59		
		Int to 5 24 2½%	27		16.59		
							6,731.18 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
200		North Amer Aviation					
100		Packard Motor Car					

[fol. 101]

EXHIBIT A-18

WD 34-342

156

Capt. Daniel F. Boone
Capital Towers
208 Mass. Ave., N. W.
Washington, D. C.

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From May 31 1941
to Jun 27 1941

Customer's No. 34342

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance May 30th			6,731.18		
		6 24 to 6 21 2½%	24	Int	13.08		
							6,744.26 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
200		North Amer Aviation					
100		Packard Motor Car					

[fol. 102]

EXHIBIT A-19

90

WD 34-342

156

Capt. Daniel F. Boone
Capital Towers
208 Mass. Ave., N. W.
Washington, D. C.

Ledger
Statement of Account with
Merrill Lynch, E. A. Pierce & Cassatt
70 Pine Street, New York
From June 28 1941
to July 25 1941
Customer's No. 34342

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance June 27th			6,744.26		
		200 Greyhound Corp	1	Div		50.00	
		Int to 7-16 2½%	14		11.65		
		Check 7-18	19		75.00		
5M		Fed Land Bk 3 56 JJ	19	Rec			
	5M	Fed Land Bk 3 56 JJ	22	109¼		5,471.25	
		Ck 7 1 41 Int on 5M	23			75.00	
		Consol Fed Land Bk	23				
		3 36 56	23				
		Int to 7 18 2½%	24		1.40		
							1,236.06 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
200		North Amer Aviation					
100		Packard Motor Car					

[fol. 103]

EXHIBIT A-20

WD 34-342

156

Capt. Daniel F. Boone
Capital Towers
208 Mass. Ave., N. W.
Washington, D. C.

Ledger
Statement of Account with
Merrill Lynch, Pierce, Fenner & Beane
70 Pine Street, New York
From July 26 1941
to Aug 29 1941
Customer's No. 34342

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance July 25th			1,336.06		
		Check 7 25	26			198.89	
		Check 7 25	26			412.92	
100		Natl Gypsum $1 Par	26	Rec			
	500	Curtiss Wright	29	JE			
	200	North Amer Aviation	29	JE			
	100	Baldwin Locomotive	29	JE-			
		Int to 8 1 at 2½%	1		3.81		
	100	Packard Motor Car	1	Del			
		Check 8 1	2		57.87		
	100	Natl Gypsum $1 Par	5	7		685.93	
	200	Greyhound Corp 1936	8	JE			
							0.00

91

At the taking of the deposition counsel for the defendant objected before the Notary Public to the introduction of the foregoing exhibits, but entered no exception thereto, and no objection or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes Defendant's Exception No. 3.

The twelve photostatic sheets you hand me are copies of the original ledger account of E. A. Pierce & Company and continuing firms with Daniel F. Boone No. 2 Account. They were made in the regular course of business of E. A. Pierce & Company and continuing firms.

Exhibits B-1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 were marked for identification and offered in evidence by plaintiff, as follows:

[fol. 104]

EXHIBIT B-1

WS 81324

172

Ledger
In Account with E. A. Pierce & Co.
40 Wall Street
New York, N. Y.

Mr. Daniel F. Boone
No. 2 Acct.

September 1939

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance August 31st			17,153.31		
	100	Republic Steel	7	26¾		2,650.94	
	100	Chesapeake & Ohio	8	37		3,678.67	
		Check	8	JE	2,850.00		
	100	Western Union Tel	12	27		2,675.94	
		Check	20		25.00		
		100 Timken Det Axle	20	Div		25.00	
100		Packard Motor Car	22	Rec			
		Check	23	JE	750.00		
		Int at 3¾%	26		46.05		
		Security Position					11,793.81 Dr.
100		Curtiss Wright					
200		Greyhound New 1936					
100		Glenn L. Martin Com					
100		Natl Dairy Com					
600		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		R J Reynolds Tob B					
100		Southern Pacific					
100		Timken Detroit Axle					

[fol. 105]

EXHIBIT B-2

WS 81324

172

Mr. Daniel F. Boone
No. 2 Acct.

Ledger
In Account with E. A. Pierce & Co.
40 Wall Street
New York, N. Y.

October 1939

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Sept 30th			11,793.81		
		Check	2		60.00		
		200 Greyhound Corp	2	Div		40.00	
		100 Natl Dairy Prod	2	Div		20.00	
100		Baldwin Loco New	19	20½	2,065.00		
	100	Timken Detroit Axle	19	20		1,980.46	
	100	Glenn L Martin Com	27	41⅛		4,141.36	
		Int at 3¾%	27		36.89		
		Security Position					
100		Baldwin Loco New					
100		Curtiss Wright					
200		Greyhound New 1936					
100		Natl Dairy Com					
600		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		R J Reynolds Tob B					
100		Southern Pacific					

7,773.88 Dr.

[fol. 106]

EXHIBIT B-3

WS 81324

Ledger
In Account with E. A. Pierce & Company
40 Wall Street
New York, N. Y.

Mr. Daniel F. Boone
No. 2 Acct.

November 1939

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance October 31st			7,773.88		
		Check	6	JE		2,250.00	
	100	Curtiss Wright	8	11¾		1,157.93	
300		Curtiss Wright	8	10½	3,192.00		
400		Curtiss Wright	8	10½	2,128.00		
200		North Amer Aviation	8	27⅜	5,555.00		
100		United Aircraft	8	47	4,717.00		
100		Natl Gypsum $1 Par	10	11½	1,164.00		
100		Otis Elevator New	10	18	1,814.00		
		Check	10	JE		466.00	
		Check	15		50.00		
		100 Reynolds Tob B	15	Div		50.00	
		Interest at 3¾%	27		49.88		
		Security Position					22,519.83 Dr.
100		Baldwin Loco New					
500		Curtiss Wright					
200		Greyhound New 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator New					
600		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		R J Reynolds Tob B					
100		Southern Pacific					
100		United Aircraft					

[fol. 107]

EXHIBIT B–4

WS 81324

Ledger
In Account with E. A. Pierce & Company
40 Wall Street
New York, N. Y.

November 1939

Mr. Daniel F. Boone,
No. 2 Acct.

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Nov. 30th			22,519.83		
		Currency	4	JE		1,500.00	
100		Western Union Tel	5	25	2,515.00		
		Check	15		345.00		
		200 North Amer Avia	15	Div		200.00	
		100 Natl Dairy Prod	15	Div		20.00	
		100 United Aircraft	15	Div		125.00	
		Check			100.00		
		100 Pennsylvania RR	18	Div		100.00	
		Check	20		35.00		
		100 Otis Elevator	20	Div		35.00	
		Check	21		150.00		
		200 Greyhound Corp	21	Div		150.00	
		Check	22		25.00		
		100 Natl Gypsum	22			25.00	
		Check	26		30.00		
		100 Reynolds Tob B	26	Div		30.00	
		Int to 12 24 3¾	27		72.21		
		Security Position					23,607.04 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
600		Packard Motor Car					
100		Paramount Pictures					

[fol. 108]

EXHIBIT B–5

WS 81324

172

Ledger
In Account with E. A. Pierce & Company
40 Wall Street
New York, N. Y.

Mr. Daniel F. Boone
No. 2 Acct.

December 1939

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
100		Pennsylvania RR					
100		R J Reynolds Tob B					
100		Southern Pacific					
100		United Aircraft					
100		Western Union Telegraph					

[fol. 109]

EXHIBIT B-6

WS 81324
172

Ledger
in Account with E. A. Pierce & Company
40 Wall Street
New York, N. Y.

January 1940

Mr. Daniel F. Boone

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Dec 31st			23,607.04		
	100	Western Union Tel	4	28		2,775.94	
		Check	4	JE	680.00		
		Check	19	JE	300.00		
	100	R J Reynolds Tob B	23	41¼		4,103.41	
		Int to 1 24 3¾%	29		71.57		
		Security Position					17,779.26 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
600		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Southern Pacific					
100		United Aircraft					

[fol. 110]

EXHIBIT B-7

WS 81324
172

Mr. Daniel F. Boone
No. 2 Acct.

Ledger
In Account with E. A. Pierce & Company
40 Wall Street
New York, N. Y.

February 1940

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Jan 31st			17,779.26		
		Int to 2 24 3¾%	27		57.37		
		Security Position					17,836.63 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
600		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Southern Pacific					
100		United Aircraft					

[fol. 111]

EXHIBIT B-8

WS 81324
172

Mr. Daniel F. Boone
No. 2 Acct.

Ledger
In Account with E. A. Pierce &Company
40 Wall Street
New York, N. Y.

March 1940

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Feb 29th			17,836.63		
		Check	20		15.00		
		100 Otis Elevator	20	Div		15.00	
		Int to 3-24 3¼%	27		53.86		
		Security Position					17,890.49 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
600		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Southern Pacific					
100		United Aircraft					

[fol. 112]

EXHIBIT B–9

WS 81324
172

Mr. Daniel F. Boone
No. 2 Acct.

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
April 1940
Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance March 31st			17,890.49		
		100 Natl Dairy Prod	1	Div		20.00	
		200 Grayhound Corp	1	Div		50.00	
		Check	2		70.00		
	100	United Aircraft	17	51½		5,127.64	
		Check 4–16	17		2,100.00		
		Int to 4–24 3¾%	24		55.54		
		Security Position					14,918.39 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
600		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Southern Pacific					

[fol. 113]

EXHIBIT B-10

WS 81324
172

Mr. Daniel F. Boone
No. 2 Acct.

Ledger
In Account with
Merrill Lynch, E. A. Pierce & Cassatt
New York

May 1940

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance April 30th			14,918.39		
		Check	1	16		1,050.00	
		Int to 5-25 3¾%	28		45.74		
		Check	29			1,900.00	
		Security Position					12,014.13 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
600		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Southern Pacific					

[fol. 114]

EXHIBIT B-11

WS 81324
172

Mr. Daniel F. Boone
No. 2 Acct.

Ledger
In Account with
Merrill Lynch, E. A. Pierce & Cassatt
New York

June 28, 1940

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance May 31st			12,014.13		
		Check	6		721.00		
	500	Packard Motor Car	10	3¾		1,804.96	
		Check	20		20.00		
		100 Otis Elevator	20	Div		20.00	
		Int to 6-22 3¾%	25		36.21		
		Check	26		50.00		
		100 Penn RR	26	Div		50.00	
							10,966.38 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Southern Pacific					

[fol. 115–134]

EXHIBIT B–12

WS 81324

172

Mr. Daniel F. Boone
No. 2 Acct.

Ledger
In Account with
Merrill Lynch, E. A. Pierce & Cassatt
New York
From June 29 1940
to July 26 1940

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance June 28th					
		Check	1		10,966.38		
		200 Greyhound Corp	1	Div	185.00		
		200 North Amer Avia	1	Div		50.00	
		100 National Dairy Prod	1	Div		100.00	
		100 Paramount Picts	1	Div		20.00	
		Int to 7-20 3¾%	23		31.97	15.00	
							10,998.35 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Southern Pacific					

[fol. 135] At the taking of the deposition counsel for the defendant objected before the Notary Public to the introduction of the foregoing exhibits but entered no exception thereto and no objection or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes Defendant's Exception No. 5.

For the dates stated, these represent all of the accounts of Daniel F. Boone with the firm of E. A. Pierce and successor companies. I can identify the check drawn on Wachovia Bank & Trust Company, Winston-Salem, N. C., on the account of Daniel F. Boone #1842, dated March 6, 1939, for the sum of $3498.00, payable to E. A. Pierce & Company. The check was credited to the account of Daniel F. Boone, WS-81324 (Exhibit A-1) on March 7, 1939.

This check was marked Exhibit E for identification.

The check drawn on Wachovia Bank & Trust Company, Winston-Salem, N. C., in the account of Daniel F. Boone, No. 1845, dated March 8, 1939, for the sum of $2313.00 payable to the order of E. A. Pierce & Company was credited to the account of Daniel F. Boone, WS 81234, on March 9, 1939.

This was marked Exhibit F for identification.

EXHIBIT "E"

Plaintiff Offered in evidence Exhibit E, as follows:

No. 1842

"Daniel F. Boone, Attorney at Law, Suite 110 Robert E. Lee Hotel, Winston-Salem, N. C.

March 6, 1939

Pay to the—E. A. Pierce Company—$3,498.00—Three Thousand Four Hundred Ninety Eight & x/100 Dollars. To Wachovia Bank & Trust Company, Winston-Salem, N. C.

(S.) Daniel F. Boone."

[fol. 136] At the taking of the deposition counsel for the defendant objected before the Notary Public to the introduction of the foregoing exhibit, but entered no exception thereto, and no objection or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes defendant's Exception No. 6.

EXHIBIT "F"

Plaintiff Offered in evidence Exhibit F, as follows:

No. 1845

"Daniel F. Boone
Attorney at Law
Suite 110 Robert E. Lee Hotel
Winston-Salem, N. C.

March 8, 1939

Pay To The—E. A. Pierce & Co.—$2,313.00. Order of Two Thousand, Three Hundred Thirteen & x/100 Dollars
To Wachovia Bank & Trust Company
Winston-Salem, N. C.

(S.) Daniel F. Boone."

At the taking of the deposition counsel for the defendant objected before the notary public to the introduction of the foregoing exhibit, but entered no exception thereto, and no objection or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes defendant's Exception No. 7.

The check you show me drawn on Wachovia Bank & Trust Company, Winston-Salem, N. C., No. 1899, dated April 10, 1939, Daniel F. Boone, Payor, E. A. Pierce Company, Payee, for the sum of $1100.00, was credited on the account of Daniel F. Boone, WS 81324, on April 11, 1939.

This check was marked Exhibit G for identification.

The check you show me on Wachovia Bank & Trust Company, Winston-Salem, No. 1911, to the order of E. A. Pierce & Company for the sum of $3535.00, D. F. Boone, Payor, [fol. 137] was credited to the account of D. F. Boone, WS 81324.

This check was marked Exhibit H, for identification.

I do not think this check you have shown me on Wachovia Bank & Trust Company, Winston-Salem, N. C., No. 2118, in the amount of $15,000.00, payable to the order of Cash, Daniel F. Boone, Payor, would be accepted drawn to Cash. I cannot find it in any of the exhibits.

This check was marked Exhibit I, for identification.

I cannot identify the check you show me in the amount of $5,000.00 on Wachovia Bank & Trust Company, Winston-Salem, N. C., dated December 22, 1939, No. 2123, drawn to the order of Cash, Daniel F. Boone, Payor.

This check was marked Exhibit J, for identification.

Plaintiff Offered in evidence Exhibit G, as follows:

EXHIBIT "G"

No. 1899

"Daniel F. Boone
Attorney at Law
Suite 110 Robert E. Lee Hotel
Winston-Salem, N. C.

April 10, 1939

Pay to the
Order of—E. A. Pierce & Company $1,100.00—Eleven Hundred Only ..... Dollars
To Wachovia Bank & Trust Company
Winston-Salem, N. C.

(S.) Daniel F. Boone."

At the taking of the deposition counsel for the defendant objected before the Notary Public to the introduction of [fol. 138] the foregoing exhibit, but entered no exception thereto, and no objection or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes defendant's Exception No. 8.

EXHIBIT "H"

Plaintiff Offered in evidence Exhibit H, as follows:

No. 1911

"Daniel F. Boone
Attorney at Law
Suite 110 Robert E. Lee Hotel

Pay to the
Order of—E. A. Pierce & Company—$3535.00—Three Thousand Five Hundred and Thirty-Five and x/100—Dollars
To Wachovia Bank & Trust Company
Winston-Salem, N. C.

Daniel F. Boone".

At the taking of the deposition counsel for the defendant objected before the notary public to the introduction of the

foregoing exhibit, but entered no exception thereto, and no objection or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes defendant's Exception No. 9.

Plaintiff Offered in evidence Exhibit I, as follows:

EXHIBIT "I"

No. 2118

"Daniel F. Boone
Attorney at Law
Suite 110 Robert E. Lee Hotel

Pay to the
Order of—Cash—$15,000—Fifteen Thousand and x/100—Dollars
To Wachovia Bank & Trust Company
Winston-Salem, N. C.

Daniel F. Boone."

[fol. 139] At the taking of the deposition counsel for the defendant objected, before the Notary Public, to the introduction of the foregoing exhibit, but entered no exception thereto, and no objection, or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes defendant's Exception #10.

Plaintiff offered in evidence *Exhibit J*, as follows:

EXHIBIT "J"

No. 2123
"Daniel F. Boone
Attorney at Law
Suite 110 Robert E. Lee Hotel
Winston-Salem, N. C.

December 22, 1939.

Pay to the order of Cash $5,000.00, Five Thousand and x/100 Dollars. To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

At the taking of the deposition counsel for the defendant objected, before the Notary Public, to the introduction of

the foregoing exhibit, but entered no exception thereto, and no objection or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes defendant's Exception #11.

Plaintiff offered in evidence *Exhibit K*, as follows:

EXHIBIT "K"

No. 2119
"Daniel F. Boone
Attorney at Law
Suite 110 Robert E. Lee Hotel
Winston-Salem, N. C.

12/20th, 1939.

Pay to the order of Cash $5,000.00, Five Thousand and x/100 Dollars. To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

[fol. 140] At the taking of the deposition, counsel for the defendant objected before the Notary Public to the introduction of the foregoing exhibit, but entered no exception thereto, and no objection or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes Defendant's Exception #12.

Plaintiff's Exhibits A-1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20,—and B-1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12,—and C-1, 2. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and D-1 and D-2 are copies of all of the accounts of E. A. Pierce & Company and continuing companies with Daniel F. Boone between December 7, 1938, and the present date.

Cross-Examination

Daniel F. Boone has no open account at the present time with the firm of Merrill, Lynch, Pierce, Fenner & Beane. He has no open account with E. A. Pierce because that has been merged into the present firm. When he closed these accounts out he paid all indebtedness he might have had existing to any of these companies. Fenner & Beane is in liquidation. We only searched the records of the accounts we took over from Fenner & Beane and we got no account from Fenner & Beane of Captain Boone.

The paper which you hand me, marked Defendant's Exhibit 1, is a letter from Merrell, Lynch, Pierce, Fenner & Beane, to Captain Daniel F. Boone.

Defendant offered in evidence *Exhibit 1,* as follows:

[fol. 141] DEFENDANT'S EXHIBIT 1

Merrill, Lynch, Pierce, Fenner & Beane,
Seventy Pine Street, New York

November 3, 1941.

Captain Daniel F. Boone, 7936 16th St., N. W., Washington, D. C.

DEAR SIR:

Our records indicate the following purchases for your accounts:

Shs	Name of Security	Purchased for Account of	Date of Purchase	Price	Net Cost
500	Curtis Wright	Daniel F. Boone	11-8-39	10½	$4,320.00
200	North Amer Avia	" #2 acct.	"	27⅝	5,555.00
100	Baldwin Loco New	" "	10-19-39	20½	2,065.00
100	Greyhound Bus, New	Daniel F. Boone Acct.	3-8-39	20⅞	2,102.50

Our records indicate that all of the above securities have been paid for in full and were delivered to you.

Very truly yours, Merrill, Lynch, Pierce, Fenner & Beane, By D. S. Patterson.

DSP:EWC.

[fol. 142] Prior to argument of the case by counsel for the plaintiffs, the Court made the folowing statement to the jury:

"Gentlemen, if you would like you may make such memoranda with pencil and paper that you would like to make, jotting down any figures, and you would be entitled to use these exhibits which are offered in evidence here in the court, but you cannot take them into the jury room without the defendant's consent, and the defendant, having no one here to give defendant's consent, the Court instructs you that you may make any notations you would like here in the court room."

The case was then argued to the jury by Messrs. J. E. Shipman and M. R. McCown, attorneys for the plaintiffs, issues being submitted to the jury as appear in the record.

In Superior Court of Henderson County

Judge's Charge

Gentlemen of the Jury, the plaintiffs, in the case of Clarence M. Lightner, Theodore A. Lightner, Mrs. Alice Lightner Hopf, Mrs. Martha Lightner Boone, and Martha Penelope Boone, a minor, against Daniel F. Boone, Trustee for Martha Penelope Boone, a minor, have brought an action alleging that the defendant, Daniel F. Boone, is in fact the trustee of the minor, Martha Penelope Boone.

The defendant admits that he is the trustee for his minor daughter, but the first issue submitted to you—(and the Court is not going to review the testimony, without objection) the first issue submitted to you: "Is the defendant, Daniel F. Boone, a trustee of the fund of $15,449.10 referred to in the complaint and answer?" carries with it the burden upon the plaintiff to satisfy you by the greater weight of the evidence not alone that he is the trustee, but as to this amourt, which the plaintiffs insist that you should so find by the greater weight of the evidence.

[fol. 143] And when the Court tells you that the plaintiffs must satisfy you by the greater weight of the evidence, it means just what is says; all the evidence, the testimony and the documentary. The plaintiffs say there is no question as to he, Daniel F. Boone, being the trustee of this fund, for his minor daughter, Martha Penelope Boone. The defendant admits the trusteeship, but denies any agreement as to any specific fund.

Therefore, you will determine from all the evidence what the true facts are; and if you are so satisfied as to the first issue, and so satisfied by the greater weight of the evidence, as the plaintiffs insist you should be, then answer it YES; if you fail to be so satisfied, as the defendant insists you should be, then it will be your duty to answer it NO.

The second issue reads as follows: "If so, is the said fund subject to the same terms and provisions set forth in the Will of Frances M. Lightner for the management and control of the trust fund for the other three Lightner grand-children, as alleged in the complaint?"

Now, Gentlemen, the plaintiffs in this action contend there is a trust fund; that that trust fund by agreement was to be managed in the same manner that another trust fund was managed in the provisions of Mrs. Daniel F. Boone's mother's will, the Will which was read to you.

As you will recall its provisions provide for three men to act as counsellors, and to determine how best to expend the $40,000 trust fund provided in Mrs. Frances M. Lightner's will for her three grand-children then born. There was no provision in this will for any unborn grand-children.

The plaintiffs insist that after the death of Mrs. Frances M. Lightner, the mother of Mrs. Boone, it was suggested to Mr. Lightner, Mrs. Boone's father, who had been provided for in the will of his wife also, that Mrs. Boone was ap- [fol. 144] proaching confinement, and would give birth to a fourth grandchild within the near future, and that he might like to make some provisions for the fourth grandchild then unborn. Then after some discussion with respect thereto he stated that it was his desire to do so, that while the $40,000 fund was intended to provide for four grand-children yet it only provided for just three; that while it actually provided for three it made an amount shortly of $15,000 each. And then Mr. Lightner agreed that two insurance policies on his life should be so modified as to provide for the payment to his daughter, Mrs. Daniel F. Boone, from which fund, or rather which fund should be set up as a trust to provide for the care and education of the then unborn child of Mrs. Boone and her husband, Daniel F. Boone.

The plaintiff, Mrs. Boone, insists that at the time it was discussed it was within the contemplation of her father, herself and her husband, that the same parties should determine the manner of its expenditure and its handling as was provided in the will of the beneficiary's wife, Mrs. Frances M. Lightner; that with that distinct understanding, after her father's death, and after the birth of her child, the plaintiffs contend that Mrs. Boone received in two checks, as the beneficiary of the insurance policies upon her father's life, the sum of $15,449.10; that the two checks in question were executed to her and that she endorsed them over to her husband, with the distinct understanding, the plaintiffs contend, that they were to go into the setting up of a trust fund to be administered as heretofore stated.

The plaintiff, Mrs. Daniel Boone, insists that the paper writing at that time referred to in the sixth issue had never been heard of by Mrs. Boone; that it could not have been within the contemplation of the parties at that time, the

time the trust fund was established, for that Mrs. Boone had [fol. 145] neither seen nor heard of it, and that in truth and fact it didn't exist.

The plaintiffs ask you to answer the second issue YES, and the burden is upon the plaintiffs relating to the second issue, and if you are so satisfied answer it YES, and if you are not so satisfied, remembering that there is no burden on the defendant, answer it NO.

The Court refers you to the fact that the defendant is not here and his not being here does not remove the burden on the plaintiffs of bearing the greater weight of the evidence relating to such issues as the Court may submit to you. The defendant contends that there was a trust fund, but that he was to be the sole arbitrator, the sole trustee, and the sole determiner and manager of the said trust fund, without stint, hindrance or interference of any persons, relatives, or anyone whatever. You will recall that he admits he was the trustee, and is the trustee for his daughter, but he insists that he is the sole trustee for his daughter, and solely responsible therefor, and insists that you should answer the second issue NO.

The third issue is: "If so, has the defendant, as trustee, administered said trust fund as provided for in said will?"

(c) The burden is on the plaintiffs to satisfy you by the greater weight of the evidence on that issue as to their contentions relating thereto; and they say that from the defendant's own admissions he has not administered the said trust fund as provided for by the will of Frances M. Lightner, and they ask you, under all the evidence, to answer the third issue NO; IF YOU SHALL FAIL SO TO FIND, THEN YOU SHOULD ANSWER THE THIRD ISSUE YES. (d)

To the foregoing portion of the charge between the letters (c) and (d) the defendant excepts.

Exception No. 13.

[fol. 146] The words CAPITALIZED were not in the record of the charge as reported by the Court Reporter and were inserted by the Court of its own volition when the case was settled on appeal in the presence of counsel for plaintiffs and defendant. Defendant objected; overruled exception; the same not having been in plaintiffs' counter-case on appeal.

EXCEPTION NO. 14.

Now, Gentlemen, you will bear in mind on all the other issues except the third and fifth the plaintiffs insist you should answer yes, and on the third and fifth issues they ask you to answer the third no, and the fifth a sum of money.

The fourth issue is: "Has the defendant failed to administer said trust fund as by law required of trustees, as alleged in the complaint?" However, Gentlemen, I am going to pass over this issue and refer to it later.

(e) The fifth issue is: "What amount, if any, has the defendant received as dividends and profits on said funds?"

The burden as to that issue is upon the plaintiffs to satisfy you by the greater weight of the evidence of their contentions relating thereto; and they insist that from all the evidence that you should find, and find by the greater weight thereof, that the defendant, Daniel F. Boone, has received on this account as dividends and profits the sum of $4,228.89, and that you should answer that issue, the fifth issue, in said amount; or if you fail to answer it in the said amount you should answer it in a substantial amount.

The burden is on the plaintiff to satisfy you on this issue, first that you should answer it in any amount, and second, what amount.

The defendant insists you should not answer it in any amount, on the contention that he wasn't required to give [fol. 147] any accounting whatever; that he has not accounted to any person, or Court, or anyone whatsoever. (f)

To the foregoing portion of the charge between the letters (e) and (f) the defendant excepts.

EXCEPTION NO. 15.

The sixth issue reads as follows: "Was Clarence A. Lightner, on October 11, 1938, without sufficient mental capacity to execute the paper writing alleged in defendant's answer, and copy thereof annexed thereto as defendant's Exhibit #1, as alleged in the plaintiffs' reply?"

The plaintiffs insist that Mr. Clarence Lightner, on the day of the execution of the paper writing, if he executed it, was not in sufficient mental condition, or hadn't sufficient mental capacity to execute such a paper writing.

Now, the question will arise immediately as to what sufficient mental capacity means—what mental capacity is required under such circumstances. The Court charges you that it is that degree of mental competence which en-

ables a man reasonably to understand and comprehend the nature and extent of his estate, the effect of his act, the natural objects of his bounty, and the natural calls of others upon his charitable sentiments; but that doesn't require that he be educated, or that he may have any vast understanding of these facts, but that he must reasonably appreciate what he is doing.

The plaintiffs insist that he was without such capacity on the date in question, and ask you to answer the sixth issue yes. Whereas, the defendant insists that he had sufficient mental capacity; that he wasn't without such capacity; that he knew what he was about; that he signed the paper in question and that at the time and place in question he knew what he was about and did so of his own volition, with full understanding and appreciation thereof, and asks you to answer the sixth issue no.

[fol. 148] Now Gentlemen, the paper writing alleged to have been signed by Clarence Lightner was offered in evidence by the plaintiffs; but with the stipulation that it was offered for the purpose of attack. In other words, the plaintiffs are attacking it, and not asserting it.

Now, Gentlemen, I will revert to the fourth issue, which reads: "Has said defendant failed to administer said trust fund as by law required of trustees, as alleged in the complaint?"

I wanted to read you the statute in this connection, but we do not seem able to lay our hands on it immediately. The Court charges you that as to this trustee, and to other trustees in North Carolina, he is required to make an accounting of his estate, to show what he has received, and show how he has expended it, and show how he has invested it and what profits he has received, if any. That is the protection the law clothes wards with.

The defendant insists that he wasn't required to make any report to anyone, or to any Court, and that he has not done so. He contends that his failure to do so was not for the purpose of evading the law and that he should not be prejudiced thereby, for that, he contends, he wasn't required to make such report, and that you should answer the fourth issue NO.

Whereas, the plaintiff insists that on the contrary the law requires him to make such report, and irrespective of the requirement of the law, this bequest should be admin-

istered similar to the one under the will of Mrs. Lightner, and that you should so find by the greater weight of the evidence and answer said issue YES.

Now, the burden is on the plaintiffs as to each and every one of the issues to satisfy you by the greater weight of the evidence of their contentions relative thereto.

[fol. 149] Gentlemen, Mrs. Boone has testified in behalf of the plaintiffs. She is the mother of Penelope Boone, the minor child. You will scrutinize her testimony in the light of her interest, giving it the same weight as you would otherwise to that of a disinterested witness if you find it's worthy of belief and truth.

You will also scrutinize the depositions that have been offered in evidence. A deposition is simply testimony taken in the absence of the jury and read to you in court.

Now, gentlemen, you have heard the evidence and you may make up your verdict as you find the facts warrant. You will bear in mind that the plaintiffs insist that you should answer all the issues YES, except the third and fifth; that you should answer the third NO, and the fifth, "$4,228.89" as the plaintiff's contend as to each issue.

Gentlemen, you may retire and make up your answers to these issues.

To the failure of the Judge to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon in accordance with Consolidated Statutes, Section 564, the defendant objects and excepts.

EXCEPTION NO. 16.

The jury thereupon returned the issues answered as appear in the record, and on Tuesday, May 26, 1942, the Court signed judgment as appears in the record. On Thursday, May 28, 1942, Mr. Cocke, of the firm of Williams & Cocke, appeared before the Court and the appeal entries which appear in the record were thereupon made. The defendant objected to the judgment and to the signing thereof on the said May 28, 1942, and excepted and appealed to the Supreme Court, moving to set the verdict aside, [fol. 150] which motion was overruled. Defendant excepted. To the failure of the Court to set the verdict aside, the defendant objected; overruled; exception.

EXCEPTION NO. 17.

The defendant excepted to the judgment and appealed to the Supreme Court of North Carolina.

EXCEPTION NO. 18.

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IN SUPERIOR COURT OF HENDERSON COUNTY

NOTICE

To Messrs. Williams & Cocke, Attorneys for Daniel F. Boone, Defendant:

You will please take notice that the plaintiffs, through their counsel, J. E. Shipman and McCown & Arledge, propose the foregoing as a counter-case, and this proposed counter-case is served pursuant to the applicable statutes.

This 16th day of July, 1942.

J. E. Shipman, McGown & Arledge, Attorneys for Plaintiffs.

Due and legal service of the foregoing counter-case is hereby accepted, this 16th day of July, 1942, and further service is waived.

Williams & Cocke, Attorneys for Defendant.

IN SUPERIOR COURT OF HENDERSON COUNTY

SETTLEMENT OF CASE BY THE JUDGE, JULY 28, 1942

In the presence of counsel for plaintiffs and defendant, pursuant to notice duly given, the foregoing is settled by the Court as the Case on Appeal to the Supreme Court.

Done at Chambers in Asheville, N. C., this July 28th, 1942.

H. Hoyle Sink, Judge.

IN SUPERIOR COURT OF HENDERSON COUNTY

ASSIGNMENTS OF ERROR

The defendant herewith groups his exceptions and assignments of error as follows:

1. The Superior Court erred in its order of February 2, [fol. 151] 1942, as set forth in EXCEPTION #1, denying

defendant's motion for continuance until after his service in the Army of the United States is terminated for that the Court failed to make a finding that the defense of the action by the defendant would not be hindered by his Military Service as provided by Section 201 of the Soldiers and Sailors Civil Relief Act, and in its discretion overruled the motion for continuance, and for other reasons, and in ordering a deposit of securities with the Clerk of Superior Court of Henderson County for that, among other reasons, the Court had no power to enter such an order as set forth in EXCEPTION #1 (R. p. 50).

2. The Superior Court erred in denying defendant's request for a continuance at the May-June, 1942, Term of the Superior Court of Henderson County as set forth in defendant's EXCEPTION #2, for that, among other reasons, the Court failed to make a finding that the defense of the action by the defendant would not be hindered by his Military Service as provided by Section 201 of the Soldiers and Sailors Civil Relief Act and in its discretion overruled the motion for a continuance. This constitutes assignment of error #2 (R. p. 60).

3. The Superior Court erred in allowing into the evidence, over the objection of the defendant, as set out in EXCEPTION #3 (R. p. 103), Exhibits A-1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20, set out below, for that the said exhibits were not material to the issues involved in the case and were prejudicial to the defendant, were not properly identified and were not the best evidence, and that the Court failed to pass upon the introduction of said exhibits at the time of the trial although an objection was made to the introduction of said exhibits at the time of the taking of the deposition by the plaintiffs and other reasons. (R. p. 103):

[fol. 152-190] Exhibits A-1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 were marked for identification. Omitted, printed side page, 84 ante.

[fol. 191] This constitutes Assignment of Error No. 5.

6. The Superior Court erred in allowing into the evidence over the objection of the defendant, as set out in Exception No. 6, Exhibit E, set out below, for that the said Exhibit was not material to the issues involved in the case and was

prejudicial to the defendant, was not properly identified and was not the best evidence, and that the Court failed to pass upon the introduction of said Exhibit at the time of the trial although an objection was made to the introduction of said Exhibit at the time of the taking of the deposition by the plaintiffs and other reasons. (R. p. 136.)

No. 1842

"Daniel F. Boone

Attorney at Law

Suite 110 Robert E. Lee Hotel

Winston-Salem, N. C.

March 6, 1939.

Pay to the order of E. A. Pierce Co., $3,498.00—Three Thousand Four Hundred Ninety Eight & x/100 Dollars.

To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

This constitutes Assignment of Error No. 6.

7. The Superior Court erred in allowing into the evidence, over the objection of the defendant, as set out in Exception No. 7, Exhibit F, set out below, for that the said Exhibit was not material to the issues involved in the case and was prejudicial to the defendant, was not properly identified and was not the best evidence, and that the Court failed to pass upon the introduction of said Exhibit at the time of the trial, although an objection was made to the introduction of said Exhibit at the time of the taking of the deposition by the plaintiffs and other reasons. (R. p. 136):

[fol. 192]

No. 1845

"Daniel F. Boone

Attorney at Law

Suite 110 Robert E. Lee Hotel

Winston-Salem, N. C.

March 8, 1939.

Pay to the order of E. A. Pierce & Co., $2,313.00—Two Thousand, Three Hundred, Thirteen and x/100 Dollars.
To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

This constitutes Assignment of Error No. 7.

8. The Superior Court erred in allowing into the evidence, over the objection of the defendant, as set out in Exception No. 8, Exhibit G, set out below, for that the said Exhibit was not material to the issues involved in the case and was prejudicial to the defendant, was not properly identified and was not the best evidence, and that the Court failed to pass upon the introduction of said Exhibit at the time of the trial although an objection was made to the introduction of said Exhibit at the time of the taking of the deposition by the plantiffs and other reasons. (R. p. 138):

No. 1899

"Daniel F. Boone

Attorney at Law

Suite 110 Robert E. Lee Hotel

Winston-Salem, N. C.

April 10, 1939.

Pay to the order of E. A. Pierce & Company $1,100.00—Eleven Hundred Dollars only.
To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

This constitutes Assignment of Error No. 8.

9. The Superior Court erred in allowing into the evidence, over the objection of the defendant, as set out in

[fol. 193] Exception No. 9, Exhibit H, set out below, for that the said Exhibit was not material to the issues involved in the case and was prejudicial to the defendant, was not properly identified and was not the best evidence, and that the Court failed to pass upon the introduction of said Exhibit at the time of the trial although an objection was made to the introduction of said Exhibit at the time of the taking of the deposition by the plaintiffs and other reasons. (R. p. 138):

No. 1911

"Daniel F. Boone

Attorney at Law

Suite 110 Robert E. Lee Hotel

Winston-Salem, N. C.

Pay to the order of E. A. Pierce & Company $3,535.00—Three Thousand Five Hundred and Thirty-five and x/100 Dollars.

To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

This constitutes Assignment of Error No. 9.

10. The Superior Court erred in allowing into the evidence, over the objection of the defendant, as set out in Exception No. 10, Exhibit I, set out below, for that the said Exhibit was not material to the issues involved in the case and was prejudicial to the defendant, was not properly identified and was not the best evidence, and that the Court failed to pass upon the introduction of said Exhibit at the time of the trial, although an objection was made to the introduction of said Exhibit at the time of the taking of the deposition by the plaintiffs and other reasons (R. p. 139):

No. 2118

"Daniel F. Boone

Attorney at Law

Suite 110 Robert E. Lee Hotel

Winston-Salem, N. C.

December 19, 1939.

[fol. 194] Pay to the order of Cash $15,000.00--Fifteen Thousand and x/100 Dollars.

To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

This constitutes Assignment of Error No. 10.

11. The Superior Court erred in allowing into the evidence, over the objection of the defendant, as set out in Exception No. 11, Exhibit J, set out below, for that the said Exhibit was not material to the issues involved in the case and was prejudicial to the defendant, was not properly identified and was not the best evidence, and that the Court failed to pass upon the introduction of said Exhibit at the time of the trial although an objection was made to the introduction of said Exhibit at the time of the taking of the deposition by the plaintiffs and other reasons. (R. p. 139):

No. 2123

"Daniel F. Boone

Attorney at Law

Suite 110 Robert E. Lee Hotel

Winston-Salem, N. C.

December 22, 1939.

Pay to the order of Cash $5,000.00—Five Thousand and x/100 Dollars.

To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

This constitutes Assignment of Error No. 11.

12. The Superior Court erred in allowing into the evidence, over the objection of the defendant, as set out in Exception No. 12, Exhibit K, set out below, for that the said Exhibit was not material to the issues involved in the case and was prejudicial to the defendant, was not properly identified and was not the best evidence, and that the Court [fol. 195] failed to pass upon the introduction of said Exhibit at the time of the trial although an objection was made to the introduction of said Exhibit at the time of the taking of the deposition by the plaintiffs, and other reasons. (R. p. 140):

No. 2119

"Daniel F. Boone

Attorney at Law

Suite 110 Robert E. Lee Hotel

Winston-Salem, N. C.

12/20th, 1939.

Pay to the order of Cash $5,000.00—Five Thousand Dollars and x/100.

To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

This constitutes Assignment of Error No. 12.

13. The Court erred as set forth in defendant's Exception No. 13 (R. p. 145) charging the jury as follows:

"The burden is on the plaintiffs to satisfy you by the greater weight of the evidence on that issue as to their contentions relating thereto; and they say that from the defendant's own admissions he has not administered the said trust fund as provided for by the will of Frances M. Lightner, and they ask you, under all the evidence, to answer the third issue No; If You Shall Fail so to Find, Then You Should Answer the 3rd Issue Yes."

This constitutes Assignment of Error #12.

14. The Court erred as set forth in defendant's Exception No. 14 (R. p. 146) in inserting in the charge the following, to-wit:

"If you shall fail so to find, then you should answer the 3rd issue Yes."

The grounds of this assignment of error is that the Court inserted this in the charge of its own volition when the case on appeal was settled when said portion inserted was not [fol. 196] in the record of the charge as reported by the court reporter and was not in plaintiffs' counter-case on appeal.

This constitutes Assignment of Error #14.

15. The Court erred as set forth in defendant's Exception No. 15 (R. pp. 146-147) in charging the jury as follows:

"The fifth issue is: 'What amount, if any, has the defendant received as dividends and profits on said funds?' The burden as to that issue is upon the plaintiff to satisfy you by the greater weight of the evidence of their contentions relating thereto; and they insist that from all the evidence that you should find, and find by the greater weight thereof, that the defendant, Daniel F. Boone, has received on this account as dividends and profits the sum of $4,228.89, and that you should answer that issue, the fifth issue, in said amount; or if you fail to answer it in said amount you should answer it in a substantial amount.

"The burden is on the plaintiff to satisfy you on this issue, first, that you should answer it in any amount, and second, what amount.

"The defendant insists you should not answer it in any amount, on the contention that he wasn't required to give any accounting whatever; that he has not accounted to any person, or Court, or anyone whatsoever."

This constitutes Assignment of Error #15.

16. The Court erred in failing to state in a plain and concise manner the evidence in the case and to explain the law arising thereon in accordance with Consolidated Statutes 564 as set forth in Exception No. 16 (R. p. 149).

This constitutes Assignment of Error #16.

17. The Superior Court erred in overruling defendant's motion to set the verdict aside as set forth in defendant's [fol. 197] Exception No. 17, (R. p. 150).

This constitutes Assignment of Error #17.

18. The Court erred in its judgment as appears in the record and in signing same, as set forth in defendant's Exception No. 18 (R. p. 150).

This constitutes Assignment of Error No. 18.

19. The Court erred in its judgment as appears in the record in making finding of fact #4 as to the present value of the securities constituting the trust fund. The grounds for this Assignment of Error, among others, are that the facts found by the Court constitute an issue of fact for the

jury and not a question of fact for the Court and the Court invaded the province of the jury in attempting to make such finding.

This constitutes Assignment of Error #19.

20. The trial Court erred in entering the judgment which appears of record by inserting under Finding of Fact #5 mixed conclusions of law and fact, to the effect that under the law of North Carolina a trustee cannot invest the trust fund in such stocks as these funds were invested in. The grounds for this Assignment of Error are that the Court erred as a matter of law for the reason that it has been held in the case of *Sheets* v. *J. G. Flynt Tobacco Company,* that trust funds may be invested in stocks and other securities if the investments are made in good faith and with ordinary business prudence; additional grounds for this Assignment of Error are that the Court again has invaded the province of the jury in finding that such investments were made wrongfully.

This Constitutes Assignment of Error #20.

21. The trial Court erred in finding as a fact in the judgment that the defendant has had ample time and opportunity to properly prepare his defense in this case and that his Military Service has not prevented him from doing [fol. 198] this for that the said Court had no power to make such finding and that there is no evidence in the record to sustain such finding of fact in the judgment.

This constitutes Assignment of Error #21.

22. The trial Court erred in finding as a fact in the judgment the following:

"It is apparent that he only sought to use the provisions of the Soldiers and Sailors Civil Relief Act as a shield for his wrongdoing."

The grounds for this assignment are that the Court had no power in the judgment to make such findings and that there is no evidence in the record to sustain such finding of fact.

This constitutes Assignment of Error #22.

23. The Court erred in its judgment in finding as a fact the following:

"That the said fund has been increased by dividends and profits in the sum of $4228.89 and that the defendant, Daniel F. Boone, individually, is accountable for the total of the two sums mentioned, that is to say, the total sum of $19,677.99." Grounds for this assignment are that there is no evidence to sustain such finding and that the said finding is contrary to all the evidence in the record.

This constitutes Assignment of Error #23.

24. The trial Court erred in its judgment in taking judicial notice of the value of the stocks involved as quoted in the daily newspaper for that the said action of the Court is contrary to law.

This constitutes Assignment of Error #24.

This the 3rd day of August, A. D. 1942.

Respectfully submitted, Williams & Cocke, Attorneys for Defendant.

(Clerk's certificate to foregoing transcript omitted in printing.)

[fol. 199] SUPREME COURT OF NORTH CAROLINA, FALL TERM, 1942

No. 164

CLARENCE M. LIGHTNER, et al.,

v.

DANIEL F. BOONE, Trustee

Appeal by Defendant from Sink, J., May-June Term, 1942, of Henderson

Civil action for an accounting of trust funds.

By the will of Frances M. Lightner, late of Polk County, this State, published and probated in 1938, a trust fund of $40,000.00 was set aside for the proper college education of her grandchildren living at her death, and her son-in-law, Daniel F. Boone, an attorney of Winston-Salem, N. C., was named as trustee of this fund. An advisory committee was also named in the will, and the trustee was enjoined to consult this committee in the handling of the trust estate. The trust was to terminate as to each grandchild upon reaching the age of 30 years. After-born grandchildren were specifically excluded from the fund. The plaintiff, Martha Penelope Boone, who was born 14 September, 1938, falls in this excluded class.

In order to place the plaintiff, Martha Penelope Boone, on a parity with the other grandchildren, her grandfather, Clarence A. Lightner, assigned and transferred two of his life insurance policies, aggregating $15,449.10, to her mother, Martha Lightner Boone, with the understanding and agreement that the proceeds of such insurance, when collected, should constitute a trust fund for the education of Martha Penelope Boone, on the same terms and provisions as set forth in the will of Frances M. Lightner for the management and control of the educational trust fund provided therein for the other grandchildren. Clarence A. Lightner died 8 December, 1938. His life insurance policies were duly collected and the proceeds were turned over to the defendant as an educational trust fund for the benefit of Martha Penelope Boone. The other plaintiffs allege an interest in this fund in case the whole fund is not properly expended prior to her attaining the age of 30 years.

Due to disclosures made in other litigation, Lightner v. Boone, 221 N. C. 78, 19 S. E. (2d) 144, the plaintiffs became apprehensive of the safety of the trust fund here involved, and on 21 June, 1941, they instituted this action in Polk County and caused summons and complaint to be personally served on the defendant on 23 June, 1941, by the Sheriff of Forsyth County. The defendant filed answer 5 August, [fol. 200] 1941, asking that the action be dismissed for that "because of what took place in the Superior Court of Forsyth County" on 23 June, 1941, he had concluded "on that date" to terminate his previous North Carolina domicile and residence and change it to Washington, D. C., by reason of which the courts of this State are without any jurisdiction in the matter, and further alleging that by virtue of written instructions given by Clarence A. Lightner, prior to his death, the defendant was authorized to expend said funds, in his discretion, "for the general care and education of Martha Penelope Boone". The plaintiffs challange the validity of these instructions on the ground of mental incapacity of the maker. The defendant admitted "that he is not managing said fund pursuant to any directions in the will of Frances M. Lightner". His answer was signed by Roy L. Deal, Winston-Salem, N. C., attorney for defendant, and Clifford M. Toohy, Detroit, Mich., of counsel for defendant.

It appears that the defendant took a number of depositions in Washington and New York during the latter half of 1941, preparatory to his defense herein.

When the case was called for trial at the January-February Term, 1942, Polk Superior Court, the defendant, through his counsel, made application for a stay of the proceeding under the provisions of an Act of Congress, known as the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U. S. C. A. Appendix 501 et seq. (printed in full in 130 A. L. R. 794), it being alleged that the defendant was a Major in the United States Army and had been called into active service on 8 November, 1940, and assigned to duty in Washington, D. C.

It was further made to appear that defendant's Michigan counsel was busily engaged in the trial of causes in Detroit and his resident counsel, also a major in the United States Army, was expecting to be called immediately into the military service, and that, therefore, it would be necessary for defendant to procure additional counsel.

The court transferred the case to Henderson Superior Court and ordered a continuance until the May-June Term, 1942, thereof, and set the case peremptorily for hearing on the first day of the term, counsel for defendant requesting "that the case be continued until May 25, 1942, in order to give the defendant ample time to employ other counsel". [fol. 201] On account of the nature of the action, and the charges involved, the court ordered the defendant to turn over to the Clerk of the Superior Court of Henderson County, on or before the 25th day of May, 1942, all securities, evidences of indebtedness, and moneys belonging to the said educational trust. It was further provided that a copy of the order be certified to the Adjutant General of the United States for such information and grants of leave as he might deem appropriate. These precautions were taken "to avoid undue delay to anyone".

When the case was again called for trial on 25 May, 1942, Henderson Superior Court, the defendant appeared through his counsel, R. R. Williams of the Asheville Bar, "for the sole purpose of moving for a continuance". The motion was overruled; whereupon counsel for the defendant declined to appear further in the case.

The trial proceeded before the jury and resulted in a verdict and judgment for plaintiffs. Judgment was signed on Tuesday 26 May. Two days later, on 28 May, Mr. Cocke of the firm of Williams & Cocke, appeared before the court, moved to set the verdict aside, objected to the judgment and the signing thereof, and gave notice of appeal to the Supreme Court.

J. E. Shipman and McCown & Arledge for plaintiffs, appellees.

R. R. Williams for defendant, appellant.

STACY, *C. J.*:

When the trial court was last called upon to stay proceedings herein under the Soldiers' and Sailors' Civil Relief Act of 1940, he was faced with defendant's report, filed that day with the Clerk of the Superior Court of Henderson County, showing the trust account to be in a precarious condition. Eight items therein, aggregating $1042.73, represented payments made by the defendant in preparing his defense in this action. Moreover, the admission in defendant's answer that he was "not managing said fund pursuant

to any directions in the will of Frances M. Lightner", and the allegation that he was proceeding under *ante mortem* instructions from Clarence A. Lightner, which the plaintiffs challenged because of alleged incapacity of the maker, were sufficient to put the court on notice and inquiry respecting the status of the fund in suit. The court observed: "From [fol. 202] the depositions giving the records of his bank account and the ledger sheets showing his speculations with the trust funds, it appears that the defendant did not have a defense". It is the duty of a court of equity to care for trust funds, especially where the rights of minors are involved. Carter v. Young, 193 N. C. 678, 137 S. E. 875. As said by Merrimon, J., in Albright v. Albright, 91 N. C. 220, "However large may be the powers with which the trustee is invested, they are all to be exercised only for the purpose of effectuating the trust; and when it appears that such powers are perverted to the detriment of the *cestui que trust*, the court will promptly interpose its protective authority". See Young v. Hood, 209 N. C. 801, 184 S. E. 823; Heyer v. Bulluck, 210 N. C. 321, 186 S. E. 356, and cases there cited.

The burden of the appeal is, that the defendant has been deprived of his right to a stay of the proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940. This act provides:

"Sec. 201. At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service." 50 U. S. C. A. Appendix 521.

"Sec. 200. In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant • • • no judgment shall be entered • • • if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest", etc. 50 U. S. C. A. Appendix 520.

It was the opinion of the trial court that the ability of the defendant to conduct his defense was not materially affected by reason of his military service. The judgment recites a factual finding "that the defendant has had ample time and opportunity properly to prepare his defense in this case and that his military service has not prevented him from doing this. • • • His failure properly to handle the [fol. 203] trust fund or to account for the same has not been affected in any way by reason of his military service". Indeed, the trial court was strongly convinced of the necessity of prompt action on the part of the court of equity to protect the fund in suit. He permitted the defendant to use the Act of Congress as a shield, and declined to permit him to use it as a sword. In this, we think the trial court pursued the intent of the statute. Pope v. U. S. Fidelity & Guaranty Co., 20 S. E. (2d) (Ga. App.) 618; Jamaica Sav. Bank v. Bryan, 175 Misc. 978, 25 N. Y. S. (2d) 17; Annotation, Soldiers' and Sailors' Civil Relief Acts, 130 A. L. R. 774.

Speaking to a similar situation in the *Pope Case, supra*, Sutton, J., delivering the opinion of the Court, said: "So, it will be seen that a person in the military service is not entitled to a stay of a judgment against him as a matter of law under the provisions of the act of Congress just referred to, where in the opinion of the court passing on the matter the ability of such person to comply with the judgment is not materially affected by reason of his military service; nor is such person entitled to a stay of a proceeding against him, merely by virtue of said act, unless, in the opinion of the court passing on the question, his ability to conduct his defense is materially affected by reason of his military service."

To like effect is the declaration of the Circuit Court of Appeals, Sixth Circuit, in the case of Royster v. Lederle, 128 F. (2d) 197: "The object of the Act was to prevent injury to the civil rights of those in the armed services of the United States during that service in order that they would be free to devote all of their energies to the military needs of the Nation. Unless it is made to appear that the rights of the person in the service will be prejudiced by a proceeding against him, the Act is inapplicable." See, also, Swiderski v. Moodenbaugh, 45 F. Sup. 790.

Nor was it error for the court to proceed without appointing an attorney to represent the defendant. Such is the

requirement only "if there shall be a default of any appearance by the defendant". Here, there was no default of any appearance by the defendant. He had duly filed answer. Depositions had been taken. His counsel appeared at the January-February Term, 1942, and moved for a continuance. This was granted, apparently upon satisfactory [fol. 204] terms. The defendant again appeared through counsel at the May-June Term, 1942, and moved for a continuance. It is true, counsel then announced that he appeared "for the sole purpose of moving for a continuance". Nevertheless, the appearance was general, and the court was presented with a discretionary matter.

The exceptions entered to the trial are untenable. The defendant admitted in his answer that $15,449.10 had been turned over to him as a trust fund for the benefit of Martha Penelope Boone. It was clearly made to appear on the hearing that the defendant had undertaken to speculate with these funds by investing them in a marginal account in his own name with a brokerage firm in New York. Upon such showing, the court was justified in holding the defendant liable as for a breach of trust, Annotation 106 A. L. R. 271, and proceeding as in equity seemed just and right. In re Estate of Smith, 200 N. C. 272, 156 S. E. 494; 19 Am. Jur. 152; 10 R. C. L. (Equity) 349; 26 R. C. L. (Trusts) 1359. No valid reason appears for interfering with the results of the trial.

No Error.

A true copy.

Adrian J. Newton, Clerk of the Supreme Court of North Carolina. (Seal.)

[fol. 205] IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

CLARENCE M. LIGHTNER, THEODORE A. LIGHTNER, MRS. ALICE LIGHTNER HOPE, Mrs. Martha Lightner Boone and Martha Penelope Boone, a Minor, Represented in This Proceeding by Her Next Friend, C. Hauge, Plaintiffs,

v.

DANIEL F. BOONE, Trustee for Martha Penelope Boone, a Minor

Appeal Docketed 10 August, 1942

Case Argued 20 October, 1942

Opinion Filed 4 November, 1942

Final Judgment Entered 4 November, 1942

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the proceedings in the above entitled case, as the same now appear from the originals on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this 7 December, 1942.

Adrian J. Newton, Clerk of the Supreme Court of the State of North Carolina. (Seal.)

[fol. 206] [Endorsed:] No. 164. Friday, Oct. 30, 1942. Lightner v. Boone. Stacy, C. J. No error. Sch. Filed Nov. 4, 1942. In the Office of Clerk, Supreme Court of North Carolina, Henderson.

[fol. 207] SUPREME COURT OF THE UNITED STATES

[Title omitted]

No. 698, OCTOBER TERM, 1942

Order Allowing Certiorari. Filed March 8, 1943

The petition herein for a writ of certiorari to the Supreme Court of the State of North Carolina is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 208] LETTER RE STIPULATION AS TO RECORD

March 22, 1943.

Mr. Stuart H. Robeson
Attorney at Law
Investment Bldg.
Washington, D. C.

Dear Mr. ROBESON:

I have considered your letter of the 20th instant, and I cannot agree with you that the depositions in this case have no material relationship to the questions to be presented to the Supreme Court, and that they should therefore be omitted in printing the record. My idea is that these depositions were the most material thing, or among the most material things, which Judge Sink had to consider in passing on the motion for a continuance, and in view of that opinion we will insist that they remain in the record.

We are willing to agree to a stipulation omitting the printing of the following pages in No. 164 of the record in the Supreme Court of North Carolina:

(1) Pages 116 to 134, inclusive.
(2) Pages 152 to 190, inclusive.

You may prepare a stipulation to this effect if you desire, and I will be glad to sign it, or you can treat this letter as a consent to omit the printing of the part of the record stated above.

Yours very truly, McCown & Arledge, by M. R. McCown.

MRM:SM